

THE
TRANSFER OF PROPERTY
IN BRITISH INDIA PART 2
BEING AN ANALYTICAL
COMMENTARY ON THE TRANSFER OF
PROPERTY ACT, 1882 (1901)



HARI SINGH GOUR

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The Transfer Of Property In British India Part 2: Being An Analytical Commentary On The Transfer Of Property Act, 1882

Hari Singh Gour

Thacker, Spink & Co.

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Hari Singh Gour

THE
TRANSFER OF PROPERTY
IN
BRITISH INDIA.

BEING
AN ANALYTICAL COMMENTARY
ON
THE TRANSFER OF PROPERTY ACT, 1882.

*As amended by Act III of 1885, and Act II of 1900, and in part
modified by Act XV of 1895,*

WITH
*AN INTRODUCTION, AND
A COLLECTION OF CONVEYANCING PRECEDENTS; AND A
FULL REPORT OF THE PROCEEDINGS IN COUNCIL.*

BY
H. S. GOUR, M.A. (CANTAB),
OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

Calcutta:
THACKER, SPINK AND CO.
1901.

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...the law of real property, 1894. 189

100. A lease of immovable property is a transfer of a right to enjoy such property for a certain time, express or implied, or in part only, in consideration of a price paid or promised, or money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who occupies the land on such lease.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, service or other thing to be rendered is called the rent.

101. A leasehold estate is an estate in land which is created by a lease. It is a right to enjoy the land for a certain time, express or implied, or in part only, in consideration of a price paid or promised, or money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who occupies the land on such lease. The leasehold estate is a right to enjoy the land for a certain time, express or implied, or in part only, in consideration of a price paid or promised, or money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who occupies the land on such lease.

102. A leasehold estate is an estate in land which is created by a lease. It is a right to enjoy the land for a certain time, express or implied, or in part only, in consideration of a price paid or promised, or money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who occupies the land on such lease.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be rendered is called the rent.

704. Analogous law.—This chapter relating to leases applies to all classes of leases excepting agricultural leases which are, by sec. 117, exempted from its provisions. Such leases are however the exception which must be made out, and failing which the provisions of this chapter would equally apply to them.¹ The definition of a “lease” as here given should be compared with the definition of a “tenant” in the several local Acts. Thus in the Bengal Tenancy Act :—² “A tenant means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person.”³ In the Central Provinces this definition has been adopted almost word for word. It says—“‘tenant’ means a person who holds land of another person, and is, or, but for a special contract, would be, liable to pay rent for that land to that other person. But it does not include a farmer, mortgagee or *thekadar* of proprietary rights.”⁴ In the North-Western Provinces a “tenant” is also similarly defined.

¹ *Unrao Bibi v. Mahomed*, I. L. R., 27 Cal., 205 (207).

² Act VIII of 1855.

³ *Ib.*, sec. 8 (3).

⁴ Act XI of 1898, s. 2 (10); two explanations appended to the section have been left out in the above quotation.

705. In this chapter an attempt has for the first time been made to codify the law relating to landlord and tenant. Formerly the English law was held applicable to cases when no precise rules

Previous law. regarding the subject were to be found in the Hindu or other laws.¹ And in a tenancy created by express contract between Hindus in Calcutta, Hindu law was held to be strictly applicable.² Prior to the passing of the Act there was no distinction drawn in the law between agricultural and non-agricultural tenancies.³

706. Principle.—A “lease” as defined in the section is a transfer of a *right* to enjoy the property, and differs from a sale which is a transfer of the *property* itself. A lease in India may be perpetual but in England it cannot be perpetual, but must always be for a less term than the party conveying himself has in the premises.⁴ Thus, in the words of Woodfall, a lease is “a conveyance by way of demise of lands or tenements, for life or lives, for years, or at will, but always for a term less than the party conveying himself has in the premises.” But from this it is not to be inferred that a perpetual lease is a thing unknown in England. For while no doubt technically the owner cannot grant a lease so as to enure beyond his own lifetime, in practice by an artifice beloved of English lawyers “the right to use and enjoy” may be granted for an indefinite and even an unlimited period.⁵ In England the terms “lessee” and “tenant” are used synonymously, but there is a clear distinction in the nomenclature adopted by the Legislature in this country, the term *lease* being chiefly confined to non-agricultural demises, whereas a tenant is a lessee of land for agricultural purposes, with rights and *status* given to him by law, and independently or in spite of his agreement with the landlord. It is always important to distinguish a lease on the one hand from a license, and on the other from a tenancy-holding.

707. In a lease the lessor passes an interest in the property to the lessee, which is unaffected by a subsequent disposition of the property by sale, mortgage or another lease. The interest which the lessee acquires in it is both assignable⁶ and heritable,⁷ and will therefore pass on his death to his representatives. Hence the lessee or his representatives can maintain a suit against the lessor or his representatives for reinstatements or damages for wrongful eviction.

¹ *Tara Chand v. Ram Gobind*, I. L. R., 4 Cal., 781.

² *Russickoll v. Lokenath*, I. L. R., 5 Cal., 683.

³ *Madhab Chandra v. Bejoy Chand*, 4 C. W. N., cxxx.

⁴ Woodfall, *Landlord and Tenant* (16th Ed.), p. 124 (16th Ed.), p. 132.

⁵ Markby, *Elements of Law* (5th Ed.), p. 168.

⁶ *Beni Madhab v. Jai Krishna*, 7 B. L. R.,

152; *Venkatasastry v. Muthuvijja*, 5 M. H. C. R., 227; *Adimubam v. Pir Ravathan*, I. L. R., 8 Mad., 424; *DeSouza v. Prestanji*, I. L. R., 8 Bom., 408.

⁷ *Lekraj v. Kashya Singh*, 17 W. R., 485; *Karunakar v. Niladhro Choudhry*, 5 B. L. R., 652; *Gaya Jati v. Ram Siwan*, I. L. R., 8 All., 569; *Vinayak v. Baba Shabudin*, I. L. R., 13 Bom., 373; *Nil Mudhab v. Narattam*, I. L. R., 17 Cal., 820.

On the other hand, the lessee as well as his representatives are bound to fulfil all the conditions of the lease and to pay rent to the lessor. A *licensee*, however, holds only on sufferance, a license being defined to be "a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property."¹ A license is not connected with the ownership of any land but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner.² It may be revoked by the grantor at any time, unless it is coupled with a transfer of property, and such transfer is in force; or the licensee, acting upon the license, has executed a work of a permanent character, and incurred expenses in the execution.³ "A lease," says Woodfall, "is also a contract for the exclusive possession of lands or tenements for some certain years or other determinate period."⁴ An instrument is not a demise or lease, although it contain the usual words of demise, if its contents show that such was not the intention of the parties. Thus, where *A* agreed with *B* to let him have the use of the Surrey Gardens and Music Hall, Newington, for four days at £100 per day, for the purpose of giving a series of four grand concerts and day and night fêtes; but from the terms of the agreement it was evident that *A* was not to part with the possession of the premises during those four days: this was held no demise.⁵ So where *A*, an owner of lace machine, paid 12s. a week to *B* for permission to place the machines in a room in *B*'s factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machine; *B* supplied the necessary steam power for working the machines, payment for which was included in the above sum, it was held there was no demise to *A* of any part of the room, and no relation of landlord and tenant created between him and *B*.⁶ Where an incorporated canal company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on the canal, it was held that the grant did not create such an interest or estate in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right of putting and using pleasure boats for hire on the canal.⁷ A license to fasten a coal-barge to moorings fixed in a river, until determined by a month's notice, the licensee to pay £30 annually towards the expense of the moorings, does not amount to a demise, nor give the licensee an exclusive right to the use of the moorings, nor render him liable to be rated as the occupier of part of the bed of the river.⁸

¹ Sec. 52, Indian Easements Act (Act V of 1832).

² *Sundrabai v. Jayawant*, I. L. R., 33 Bom., 297.

³ *Ib.*, sec. 60.

⁴ *Reg. v. Morriah*, 32 L. J. M. C., 245.

⁵ *Taylor v. Caldwell*, 32 S. J. Q. B., 164.

⁶ *Hancock v. Austin*, 14 C. B. (N. S.), 634.

⁷ *Hill v. Tupper*, 32 S. J. Ex., 317.

⁸ *Watkins v. Overcreech of Milton*, 3 Q. B., 350; *Grant v. Oxford Local Board*, 4 Q. B., 9; see also *London and North-Western Ry. Co. v. Buckmaster*, 10 Q. B., 444; *Cory v. Bristow*, 2 App. Cas., 262.

The grant by a riparian proprietor of a right to take water from a natural stream on which his land abuts, operates as a license in gross and not as a demise and will not enable the grantee to maintain an action in his own name against a wrongdoer.¹ The gratuitous loan of a shed for a particular purpose operates as a mere license revokable at any time.² A license to get all the copper or stone which may be found in part of a manor, for twenty-one years, at the yearly rental of £25 is not a demise, and will not support a distress for the rent.³ A demise of a fire-brick manufactory, for twenty-one years, with powers during such term to dig fire-clay from under certain adjoining land, does not amount to a lease, but only to a license as to the fire-clay, and will not prevent the licensor from digging parts of such fire-clay, or authorizing others to do so, or otherwise dealing with such adjoining land in a manner not inconsistent with a license.⁴ So, where the *mirasdar* of a village permitted the defendant to occupy a certain house site so long as he did a certain work, it was held that the defendant was no more than a licensee and could be evicted without notice.⁵ Thus then while a lease being a disposition of an interest in the property is not determined by the death of either party, a license is determinable at the licensor's pleasure, and is determined by his death. Moreover a licensee's possession being merely on sufferance he cannot sue the licensor or even a stranger for wrongful eviction.⁶ A license is neither heritable nor assignable. But there are certain licenses which savour the character of a lease, and of which hunting, shooting and grazing licenses are ordinary examples. Such licenses amount to the grant of incorporeal hereditaments, and the licensee or his assignee can sue for breaches of any covenant which relates to and runs with the land.⁷ Thus a perpetual lease may in many cases resemble an out and out sale, in which case the owner has no more than *nudas proprietas*, the lessee being to all intents and purposes the real owner. And the fact that the owner in this case is entitled to rent does not diminish the lessee's rights since as in a sale, so in a lease, the transferor may reserve a certain sum periodically payable to him as his *malikana* or *haqq*. *Patni*, *darpatni* and *sapatni* leases belong to this class.⁸ But where the lessor reserves to himself the right of re-entry or reversion, the transaction is clearly distinguishable as a lease, and not a sale. But, otherwise, he has no estate left in him, and the tenure will consequently, on failure of heirs of the lessee, escheat to the crown, and will not revert to the original grantor or his heirs.⁹ A *zur-i-peshgi* lease

¹ *Stockport Water Works Co. v. Potter*, 3 H. & C., 800.

² *Williams v. Jones*, 33 L. J. Ex., 297.

³ *Ward v. Day*, 33 L. J., Q. B., 254.

⁴ Woodfall's "Landlord and Tenant" (14th Ed.) 129; (15th Ed.), 135, 136; (16th Ed.), 134.

⁵ *Athakutti v. Gorinda*, I. L. R., 10 Mad., 97.

⁶ *Ward v. Day*, 33 L. J., Q. B., 254.

⁷ *Hooper v. Clark*, 2 Q. B., 200.

⁸ *Tara Chand v. Ram Gobind*, I. L. R., 4 Cal., 778 (781).

⁹ *Sonel Koer v. Himmat Bahadur*, I. L. R.,

1 Cal., 391; *Nil Mudhab v. Naruttam*, I. L. R., 17 Cal., 526 (528).

has been treated as falling under the category of usufructuary mortgage.¹

This chapter, relating to leases, codifies, as has been already observed, for the first time, the law on the subject.² It is not wholly based upon the English law from which it diverges on many not unimportant points, and which will be found noted in every case under the heading of "Analogous law."

Leases are given under so many varied conditions that they often closely resemble a sale or a mortgage.

708. Meaning of words.—"To enjoy such property": for which the consideration paid is its "rent." "For a certain time": which may be "express or implied." "Or in perpetuity": Such leases are not allowed in England. "In consideration, &c.," i.e., for money or money's worth.

709. Zur-i-peshgi lease.—A *zur-i-peshgi* lease is, as its name denotes, a species of lease the origin of which has been before stated. (§ 388.) Literally the term means³ a tenure granted in consideration of a sum of money advanced. These leases have been before stated to partake of the nature of usufructuary mortgages, but this is only when there is a power of redemption reserved to the lessor, either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be one in the nature of a mortgage.⁴ Where, therefore, this power is not reserved to the lessor a *zur-i-peshgi* lease with its analogues, the *olti*, *veppu* and *kanam*⁵ leases prevalent in Southern India must be treated as on a footing with other ordinary leases and therefore subject to the same incidents.

710. Pre-requisites of lease.—"The following things must concur in the making of every good lease: (1) There must be a lessor, who is able to make the lease. (2) There must be a lessee, who is capable of taking the thing demised. (3) There must be a thing demised which is demisable. (4) If the thing demised or the thing expressed to be granted be not grantable without a deed, or the party demising be not able to grant without a deed, the lease must be made by a deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants, and all necessary circumstances, as sealing, delivery, &c., must be observed. (5) If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession and a certain determination, either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent

¹ *Kundlall v. Baluk*, 2 Agra, 122; *Pultun Singh v. Reshal Singh*, 1 W. R., 7. [In these cases a *zur-i-peshgi* lease was held to be nothing more than a simple mortgage, but see *Kewul Sahoo v. Raul Narayan*, 18 W. R., 445.]

² *Ta'uchand v. Ram Golind*, 1. L. R., 4

Cal., 778 (781).

³ Literally *zar*, gold, money; *peshgi*, advanced.

⁴ *Per Oldfield, J.*, in *Basant Lal v. Tapeshri*, 1. L. R., 3 All., 1 (8).

⁵ *Piyathen v. Peerarayan*, 9 M. L. J. R., 106.

event, which must happen before the death of the lessor or lessee, unless, it should be added, the lease is a permanent one. (See *supra*.) (6) There must be an acceptance of the thing demised, and of the estate by the lessee."¹ The question whether a transaction is a lease or a license, or has assumed some other form of transfer often presents some difficulty. The payment of a small annual sum inadequate to the value of the demised premises even for a number of years is not *per se* evidence from which a tenancy from year to year can be inferred.²

711. Construction of lease.—Primarily the written document containing the terms of the lease is by itself the best evidence of the matter it contains, as well as of the intention of the parties, and the collateral circumstances, if any, recited therein. It is a well-known rule of construction, and one which is exemplified in the ensuing cases, that in construing a document regard must be had to all its parts, it being remembered that general words may be restrained by particular recitals. "If a deed may operate in two ways, the one consistent with the intention of the parties, and the other repugnant to it, the Courts will put such a construction on it as to give effect to the intent;³ for deeds must be construed so as to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they will in another.⁴ Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.⁵

The words inapplicable to or inconsistent with the general tenor of the deed may be omitted, if it appears that without them the sense is clear, or that they happened to have been inserted through inadvertence or mistake, and words struck out might be looked at to show what the intention of the parties was, as where an instrument originally intended to be from year to year was converted into a lease for a year determinable by a notice to quit, it was held that the words struck out might be looked at to show what the intention of the parties was, and that the terms inapplicable to the tenancy intended to have been created by the parties could be disregarded.⁶ Where a lease refers to a map or another document, the latter must be regarded as forming part of the deed.⁷ A counterpart of a lease is always admissible for the purpose of interpreting it.⁸ But parol evidence is of course inadmissible for

¹ *Shep. Touch.*, 267; *Woodfall's Law of Landlord and Tenant* (15th Ed.), 136; (16th Ed.), 81, 135.

² *Reynolds v. Reynolds*, 13 Ir. Eq. R., 173.

³ *Solly v. Forbes*, 4 Moo., 443; *Hotham v. East India Co.*, 1 T. R., 638.

⁴ *Goodtitled Edwards v. Bailey*, Cowp., 600; *Shep. Touch.*, 81 (sec. 13).

⁵ *Wright v. Dickson*, 1 Dow, 114 (147); *Woodfall's Law of Landlord and Tenant* (15th Ed.), 145; (16th Ed.), 143.

⁶ *Strickland v. Maxwell*, 2 C. & F., 539.

⁷ *Lyle v. Richards*, 1 H. L., 222.

⁸ *Magdalen Hospital v. Knott*, 8 Ch. D., 709; *Burchell v. Clark*, 1 C. P. D., 602; 2 C. P. D., 83. Cf. *Ramayya v. Krishnamina*,

the purpose of proving, interpreting,¹ contradicting, varying, adding to or subtracting from the terms of the written lease.² But the meaning of words customarily used in documents may be proved by parol.

But as before stated in construing a document, it is permissible to look to the surrounding circumstances, as for example, the nature of the possession given by the grantor and accepted by the grantee,³ and in all cases a document must be construed according to the *intention* of the parties which may be collected from the writing as well as from collateral circumstances.⁴ Thus, oral evidence of acts, conduct amounting to waiver of the lessor's right is always admissible.⁵ And evidence may similarly be given that in spite of the execution of a lease it was inoperative as where possession remained with the lessor, or that there was no change in the relationship between the parties evidencing the fulfilment of the contract.⁶

In fact, when the origin of the tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally, constitutes the best and indeed the only evidence to prove the nature of the tenancy.⁷

712. No words are prescribed in which a lease should be worded. An agreement worded thus:—"And it is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed, the rents, covenants, and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed," and in pursuance of which the lessee took possession, it was held that the concluding words were sufficient to create an actual lease.⁸ Similarly where the document concluded thus:—"And in the meantime and until such lease shall be executed, to pay the said yearly rent and to hold the same premises, subject to the covenants abovementioned," it was held that the latter words created an actual demise.⁹ So where a *kabuliat* executed by the tenant of land in *havela* tenures provided that on an adjoining *chur* becoming fit for cultivation, the whole land, old and new, held by the tenant should be measured, and, the old having been deducted from the total, rent should be paid for the

I. L. R., 23 Mad., 114 (in which a deed was interpreted in the light of the counter-deed executed on the same day).

¹ Sec. 91, Indian Evidence Act (Act IX of 1872).

² *Ib.*, sec. 92.

³ *Jankhee Nath v. Mahomed Ismail*, 22 W. R., 285.

⁴ *Smith's Landlord and Tenant* 85; *Watson & Co. v. Mohesh Narain*, 24 W. R., 176; *Gangabai v. Kalapa*, I. L. R., 9 Bom., 419;

Gangadhar v. Mahadu, B. P. J. (1889), 321; *Ramabai v. Babaji*, I. L. R., 15 Bom., 704.

⁵ *Shyamra Churn v. Hemu Mollah*, I. L. R., 26 Cal., 160 (1893).

⁶ *Preonath v. Madhu Sudan*, I. L. R., 25 Cal., 603, F. B.

⁷ *Ismail Khan v. Joypoon Bibee*, 4 C. W. N., 210 (221, 222).

⁸ *Anderson v. Millard Ry. Co.*, 30 L. J. Q. B., 94.

⁹ *Pineiro v. Judson*, 6 Bing., 206.

excess land at a specified rate up to five drones, and for any more at the prevailing pergunnah rates. It provided also that either (a) rent should be realized according to law with interest thereon; or that (b) at the close of the year, the owner should by a notice served on the *hawaladar*, require him to take a settlement of the excess land and within fifteen days to file a *kabuliat*; or (c) the excess land might be settled with others. Such a *chur* having been formed, the zemindar measured without notice to, and in the absence of, the *hawaladar*. He then served a notice on the latter requiring him to execute a *kabuliat* within fifteen days for payment at a fixed rent upon the excess land as found by the measurement, or to yield up possession, disregard of this led to a suit in which the zemindar claimed either *khas* possession or rent on measurement by order of Court. The case having gone up to the Privy Council, it was held that neither the *kabuliat* nor the terms of sec. 14 of Bengal Act VIII of 1869 precluded a suit for assessment of the rent upon measurement, nor did the absence of authentic measurement, as prescribed by the *kabuliat* have that effect, or affect the measurement by the Amin; but that until both the measurement and the assessment of the rent had taken place (which might be either in the manner prescribed or by judicial termination) the zemindar could not put the *hawaladar* to his choice between (b) executing a *kabuliat* for the rent and (c) yielding up possession.¹ In one case where an *ijara* for one hundred and twenty-five years granted to a wife stated that it was for the performance of pious acts by her and that on her death her sons were to take, and her only son died before her leaving a son, it was held that the construction inherited the term on the death of the lessee was correct.² But a fixed permanent *ijara putta*, as such, confers no right on the heirs of the demisee.³ Where the lease expressly prohibits the lessee and his heir from making any assignment of the property either by sale or gift, but does not contain any provision for forfeiture or for re-entry by reason of an assignment in violation of its terms, and there is no provision restricting a sale in execution of a decree, it is a clear law in India, as in England, that a general restriction on assignment or a provision in the lease for forfeiture or re-entry by reason of an assignment in violation of its terms does not apply to an assignment by operation of law taking effect *in invitum* as a sale under an execution.⁴ Where a *malguzar* in the Central Provinces, sold by an instrument certain lands out of his *malguzari*, and the document after describing the lands ran as follows:—"I will not eject the person above-named from the aforesaid fields and will always take Rs. 17 the rent of these

¹ *Ram Kumar v. Kali Kumar*, I. L. R., 14 Cal., 99 P.C. (106).

² *Gobind Lal v. Hemendra Narain*, I. L. R., 17 Cal., 680.

³ *Rajaram v. Narasinga*, I. L. R., 15 Mad., 199.

⁴ *Gopal Nath v. Mathura Nath*, I. L. R., 20 Cal., 278; following *Vyankatraya v. Shikrambhat*, I. L. R., 7 Bom., 256; *Tamay v. Timaya*, ib., 262; *Dicoli v. Apaji*, I. L. R., 10 Bom., 349.

fields from year to year and will not claim possession"—it was held that the sale was in effect a lease within the meaning of the section, and that the transferee from the original lessee without the *malguzar's* consent could not be ejected as he could have been were the transfer one under the Central Provinces Tenancy Act.¹ A stipulation in the lease for conversion of dry land into wet land to the effect that "if *nunja* cultivation be made on *punja* land permanently converted into *nunja* with or without water of the landlord's tank, *nunja tirwa* according to the rate fixed for such cultivation shall be paid" was held to entitle the landlord to demand wet rates according to local usage.² In a covenant in the lease by the lessor to do certain work, the clause and the whole of which is agreed to be left to the superintendence of the defendant and the plaintiff's son" was held to be neither a condition precedent to, nor concurrent with, the covenant.³ Where the landlord lets certain property describing it as "all that shop as the same was late in the occupation of C," C being the previous tenant, the words were regarded merely as descriptive and not as limiting the operation of the deed.⁴

713. A lease must be distinguished from an agreement to let, for in the two cases the party aggrieved has entirely distinct and different remedies. A paper entitled "Memorandum of an agreement between A and B, and signed by them, expressing, that in consideration of £40 A 'doth agree to let, and B doth agree to take, a messuage,' &c., at £40 per annum rent;" and it is further agreed "that A shall not raise the rent, nor turn out" B so long as the rent is duly paid quarterly, and he does not sell any article injurious to A in his business;" it was held by Eldon, L. C., that though the terms do not exclude the construction of actual demise, yet the import of the whole, looking to some future instrument, and a more permanent interest than from year to year, a demurrer to a bill for specific performance against A, who had succeeded in an ejectment, should be overruled.⁵ And it has been ruled in one case that although an agreement between an intended lessor and lessee may possibly amount at law to a present demise or assignment, yet if, upon the face of the instrument, it appears that a further instrument is necessary to carry the intention of the parties into execution, a Court of Equity will treat it as an agreement to be specifically performed in that particular.⁶

A contract of lease, like any other contract, is deemed to be made in the country in which the signature of the last necessary party to it is affixed.⁷

¹ *Binniram v. Ramprasad*, 8 C. P. L. R., 83.

² *Sattappa v. Raman*, 1 L. R., 17 Mad.,

1 (8).

³ *Jones v. Cannoek*, 8 H. L. C., 700.

⁴ *Martyr v. Lawrence*, 2 De G. J. & S., 261.

⁵ *Browne v. Warner*, 14 Ves., 166; 9 R. R.,

256; referred to in *Kusal v. Watson*, 11 Ch. D., 120.

⁶ *Fenner v. Hepburn*, 2 Y. & Coll., 159.

⁷ *Muller v. Inland Revenue Commissioner* [1900], 1 Q. B., 310.

714. Words used in lease.—In many cases leases are defined by certain well-known terms which have now assumed definite imports and are recognized as forming the necessary part of the Indian conveyancer's vocabulary. Thus the term "*zuri-peshgi*"¹ is universally understood to embrace the same conditions as an usufructuary mortgage. The words "*mokurrari istemrari*" contained in a *pottah* are taken in themselves to convey an hereditary right in perpetuity,² and the word *mokurrari* signifies that the rent is "fixed" in perpetuity,³ but in this case, on appeal, the Privy Council held that the word did not necessarily import perpetuity, although it may do so.⁴ And so it has been held in another case that although the words *mokurrari istemrari* do not *ex vi termini* make the lease permanent, still if the other terms indicated with sufficient certainty the permanent nature of the grant, the Court would be entitled to pronounce it to be perpetual.⁵ A *mirasdar* is a permanent tenant,⁶ and the same sense is conveyed by the word *nirantar* in a district where Mahrathi and Kanarese are the prevailing languages.⁷ The term "*mulgeni*" when used in a lease unmistakably denotes its permanent character.⁸ The term "*abadkari talookdari*" does not convey any *talookdari* rights but merely those of an *abadkar*.⁹ And the word "*projah*" used in a lease does not define accurately in any way the status of a tenant,¹⁰ nor does the word "*nij-jote*" as used in a *pottah*, mean land cultivated by the cultivator himself, but means lands held by the zamindars in their own possession, or their own private lands.¹¹ So where the lessee is described as "*karindah*," the word was held to be no more than descriptive of the status of the person.¹² The word "*pottah*" is a generic term and embraces every kind of engagement between the lessor and the lessee. It does not *prima facie* give any hereditary interest apart from the other words importing inheritance.¹³ The words "*more or less*" in a *pottah*, as where so many bighas of land more or less is conveyed, does not define the area, and hence the test of what is really conveyed is not the area of the land but its boundaries.¹⁴ The words "*patni tenure*"

¹ Literally means "for the money paid in advance;" see ante.

² *Lakhu v. Roy Hari*, 3 B. L. R. (A. C.), 226; *Munrunjua v. Lilanund*, 3 W. R., 84; *Lalanund v. Monorunjun*, 5 W. R., 101, in appeal 13 B. L. R., 124, P. C. The Privy Council held that the words coupled with the usage made the tenures hereditary (see p. 123); see also *Sutya Saran v. Mahesh Chandra*, 12 M. I. A., 68; *Deen Dyal v. Heera Singh*, 2 N.-W. P. H. C. R., 326.

³ *Karunzkar v. Niladhro*, 5 B. L. R., 652; *Sheo Pershad v. Kallydas*, 1 L. R., 5 Cal., 543.

⁴ *Bilasmuni v. Sheopersha*, 1 L. R., 8 Cal., 664, P. C.

⁵ *Gaya Jati v. Ramjiwan*, 1 L. R., 8 All., 560; *Tulshi Pershad v. Ram Narain*, 1 L. R.,

12 Cal., 117.

⁶ *Ramchandra Rao v. Sidu*, B. P. J. (1888), 204.

⁷ *Gangara v. Kouber*, B. P. J. (1876), 227.

⁸ *Nagapaya v. Anantaya*, B. P. J. (1891), 248; *Unhamma v. Vaikunta*, 1 L. R., 17 Mad., 218.

⁹ *Huro Pershad v. Bhojrub Chunder*, 3 W. R., 391.

¹⁰ *Kedarnath v. Sookoomaree*, 22 W. R., 396.

¹¹ *Wajooddeen v. Madho Chowdhry*, 17 W. R., 404.

¹² *Ib.*

¹³ *Dhunput Singh v. Goomun Singh*, 11 M. I. A., 433.

¹⁴ *Sheeb Chunder v. Brojonath*, 14 W. R., 361.

primâ facie convey an hereditary and transferable interest in land.¹

715. Commencement of lease.—A lease may be given so as to commence at any time, either immediately, or from a day that is past,² or at a future period, as from Michaelmas next, or at three or ten years after, or after the death of the lessor, or after the expiration of the term of the prior lessee. All leases for years, whether they begin *in presenti* or *in futuro*, must, however be certain; that is, they must have a certain beginning and a certain ending. For unless the time of the commencement is certain, it cannot be known when the rent is to become due or when the landlord is entitled to distrain for it. A lease given to begin from an impossible date would begin immediately;³ and as a rule a lease operates as a grant from the time of its execution, unless otherwise stipulated.

But although the lease may be agreed to commence *in futuro*, the contract is complete on the day it is made, and the lessee is therefore entitled to maintain a suit if his rights are in any way prejudiced by the conduct of the lessor.⁴ The fact that at the time of the lease another person is in possession of the property is immaterial and does not affect the contract,⁵ and the lessee is entitled to recover possession from such person upon proving his title.⁶

716. Immoral lease.—A lease for an immoral object is void. Accordingly it has been held that a landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there.⁷

717. Consideration for lease.—The price which the lessee pays to the lessor for obtaining the lease is designated by the section the “premium,” called in the vernacular *nazur* or *nazrana*. Other payments are called the rent. The rent of a lease need not be according to the section in money or in kind only, but may consist of “share,” “service” or “other thing.” Rent⁸ is a retribution or compensation for the property demised. “It is defined to be a certain profit issuing yearly out of land and tenements corporeal, and may be regarded as of a twofold nature:—first, as something issuing out of the land, as a compensation for

¹ *Tarini Charan v. Watson*, 3 B. L. R. (A. C.), 487; *Judoo Nath v. Judub Churn*, 11 W. R., 294; *Mothu Sudan v. Rooke*, 1 L. R., 28 Cal., 13; *Madhub Ram v. Doyal Chand*, ib., 445.

² *Enye v. Donnithorne*, 2 Burr., 1100.

³ *Co. Litt.*, 406; *Styles v. Wardle*, 4 B. & C., 908.

⁴ *Pitchakutti v. Kamala*, 1 M. H. C. R., 153 (157).

⁵ *Frankisto v. Bisanubhur*, 11 W. R., 81; *Tara Soonderry v. Shama Soonderry*, 4 W. R.,

58.

⁶ *Lokenath v. Jugobundhoo*, 1 L. R., 1 Cal., 297; *Bitan Singh v. Parbutty*, 22 W. R., 99; *Gungahurry v. Raghubram*, 14 B. L. R., 807.

⁷ *Gaurinath v. Madhumani*, 9 B. L. R. (Ap.), 87; *S. C.*, *Gaurinath v. Madhumani*, 18 W. R., 445.

⁸ The term is derived from the Latin *reddere*, to gi back, i.e., return, income revenue.

the possession during the term ; and, secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure."¹

Under the Act as in English law, rent must always be a profit ; but there is no occasion for it to be, as it usually is, a sum of money. Thus it may consist of a share of the profits made by the lessee, or of service rendered by the tenant, as where the latter works as *karindah*, or supplies so many ploughs, or ploughs up so many acres of land for the landlord. So in England, cleaning church, and ringing church-bell is service rendered by way of rent.² Ordinarily rent being profit must, it is said, issue out of the thing granted, and not be part of the land or thing itself, wherein it differs from an exception in the grant, which is always of part of the thing granted.³ But a royalty payable to a landlord upon his bricks which are made out of a brickfield is a rent, although it is not paid for the produce of the land, which is periodically renewed, but for portions of the land itself, which is gradually exhausted by the working.⁴ So also in a lease of a mare pit and brick mine, where the royalty payable was at 8*d.* *per solid yard* for all the mare obtained, and 1*s.* 8*d.* *per thousand* for all the bricks made by the lessee, it was held that the payment stipulated was rent for which the lessor was entitled to distrain.⁵

718. There are several kinds of rent known to English law. Thus rack-rent is a rent of the full annual value of the property leased, or near it.⁶ Peppercorn rent is, on the other hand, a nominal rent fixed to establish the relationship of lessor and lessee, but it is not intended to be paid, and it is usually stipulated to be only paid if demanded.⁷ Such rent has of course no money value. A quit-rent is so-called because as soon as it is paid the lessee goes quit and free of all other services. Where rent is coupled with some service it is called rent-service, and where the lessor has reserved to himself the *power to distrain* for rent, it is called a rent-charge, it being "rent-*seek*" without such a power.

Rent is a periodical payment and may accrue due annually, quarterly or according to the agreement on specified occasions. But in any case it must be fixed, and not uncertain, for an agreement in which the rent-clause is uncertain is void for uncertainty. Thus, in the lessee should agree to pay whatever rent the landlord may impose, the clause cannot be enforced and would render the whole contract nugatory, for if otherwise, the tenant might be made liable for an unreasonable rent beyond the value of the land.⁸

The meaning assigned to the term in the section, it should be noted, is much wider than in the several local land Acts. Thus

¹ Woodfall, Landlord and Tenant (16th Ed.), 408 ; Bradley, 34 ; 2 Blackstone's Commentaries, 41 ; Co. Lit., 142a ; Gibb, Rents, 1 ; Smith, L. and T. (2nd Ed.), 111.

² *Stacey v. Benham*, 7 Q. B., 976.

³ Smith, L. and T., 112 ; Woodfall, Landlord and Tenant, 401.

⁴ *Reg. v. Westbrook*, 10 Q. B., 178.

⁵ *Daniel v. Gracie*, 6 Q. B., 145.

⁶ 2 Br. & Had., Comm., 54 ; Blackstone's Commentaries II, p. 43.

⁷ *Re Chapman and Hobbs*, 23 W. R. (Eng.), 708.

⁸ *Ramasami v. Raja Gopaln*, I. L. B., 11 Mad., 200.

in the Bengal Tenancy Act¹ rent is defined to be "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord,"² thus excluding anything rendered in the nature of service. And the same view seems to have been taken both in Madras³ and the North-Western Provinces.⁴ But in the Central Provinces the term is used in the same sense as in the section, for there "rent" is defined to mean "whatever is paid, delivered or rendered, in money, kind or service, by a tenant on account of the use or occupation of land let to him."⁵

719. A contract to let may be generally compared with a contract to sell immoveable property. In

Damages.

both cases so long as there is no actual transfer, the transferee acquires no right *in rem*, but only the benefit of an obligation which may be enforced by a suit for specific performance or damages or both. No party to a contract to let can resile from it any more than a vendor can refuse to sell the property after he has agreed to sell it.⁶ And by the parity of reasoning it follows that if the lessee has not been put into possession of all the property leased to him, he may equally recover damages on account of the part of which he has not been able to obtain possession. And it has been held that a partner of a lease though he may not have been a party to the original contract, is equally entitled to sue for damages consequent upon his illegal ejectment.⁷ Where the contract is still inchoate the lessee may recover back only the earnest-money, but such a claim is not distinguishable from one for damages and the same circumstances as would equitably entitle him to damages must be averred and proved. The lessee cannot demand back his earnest-money and put an end to the contract merely because it no longer suits him, for after the contract is once entered into it becomes irrevocable and can only be avoided upon certain grounds and not merely at the option of any one of the parties.⁸

720. Stamp.—The stamp required for a lease is the *ad valorem* duty on the money consideration actually mentioned in the conveyance and not as well on the rent reserved thereby.⁹ For the purpose of stamp a contract is deemed to be made in the country in which the signature of the last necessary party to it is affixed.¹⁰

¹ Act VIII of 1885.

² *Ib.*, sec. 3 (5).

³ See Madras Act VIII of 1865.

⁴ See sec. 2, N.-W.P. Rent Act (Act XII of 1881); see *per* Oldfield, J., *Wasir Ali v. Mohammod Ismail*, 1. L. R., 8 All., 552.

⁵ C. P. Tenancy Act (Act XI of 1898), sec. 2 (8).

⁶ *Fireengee v. Ahmed*, 7 W. R., 22.

⁷ *Burroda Kant Roy v. Ram Tunnoo*, 7

W. R., 51, P. C.; S. C., *Raja Burdaknath Roy v. Alut Munjoore*, 4 M. I. A., 331 (338).

⁸ *Rajasoamar Roy v. Debendromarain*, 15 W. R., 41.

⁹ *In the matter of the Indian Stamp Act*, 1899 (sec. 57), 1. L. R., 24 Bom., 257; Act 63, Sch. I, Indian Stamp Act, 1899 (Act II of 1899).

¹⁰ *Muller v. Inland Revenue Commissioner* [1900], 1 Q. B., 410.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy ; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

721. Analogous law.—The provision as to notice contained in this section may be compared with secs. 102, 103, *ante*, which, however, apply only to mortgage. The rule here enacted is substantially the same as in England.

722. Principle.—The provisions of the section do not apply to perpetual leases, or where the lease is determined under the provisions of sec. 111. The rule has also no operation where the parties have otherwise contracted, or where the case falls under a local law or is governed by usage in which case such notice as is sanctioned by them would be sufficient. By the common law rule in England a similar notice is requisite.¹

723. Meaning of words.—"In the absence of a Contract"—between the parties regulating the giving of notice prior to the determination of the lease. "*Local law*"—such as the Tenancy Acts enacted for several provinces.

"*For agricultural or manufacturing purposes*:" the operation of the section providing for six months' notice is limited to leases obtained for the two specified purposes only. Other leases may be determined by giving only fifteen days' notice. In either case the notice must expire with the year or month of the tenancy as the case may be. "*Tendered*": as where the addressee refuses to take it.

¹ *Flower v. Darby*, 1 T. R., 150; 1 R. R., 109; *Shaw v. Porter*, 8 T. R.; 1 R. R.,

724. Nature of lease.—The question whether a lease is to be regarded as permanent or otherwise is one which is allowed by the section to be decided with reference to “a contract or local law or usage” failing which it is to receive the presumptive construction as enacted therein. Hence the party who claims to be a permanent tenant must clearly allege and prove the fact.¹ Where the lease is explicit as to its character, there is then no occasion for doubt, and the section would then of course be inapplicable. But in practice, it often happens that leases are silent as to their duration, and then it becomes a question as to whether they are to be regarded as falling within the purview of the section, or should be given some other character. Thus if the lessee has been in continuous occupation for a number of years uniformly paying the same rent, and has erected upon the premises permanent and costly structures, it would be inconsistent with human reason to regard the tenure as anything but permanent.² The erection of permanent and costly structures has been of itself regarded as stamping the lease with a permanent character.³ But this pre-supposes that the structures were raised by the consent of the landlord or that at least he knew of and acquiesced in them. In an earlier case, however, Sir Barnes Peacock seems to have gone so far as to observe that if the lessor allowed the lessee to erect *pucca* buildings upon the land without objecting, he was bound in the same way in equity as if he had granted him a *pottah* with the privilege of building *pucca* houses on the land.⁴ But this observation was in a recent case explained by Bannerji, J., to apply only to the facts of the case to which it related. “Taken in that connection,” he observed, “it does not support the broad proposition that a landlord by merely not objecting to his tenants raising *pucca* buildings confers on the tenant a permanent right to remain on the land. If there are other circumstances in the case, such as long possession, such circumstances coupled with the acquiescence of the landlord in the raising of *pucca* buildings and his continuing to receive rent from the tenant after such buildings have been raised may justify an inference that a tenant has a permanent right. But just as coupled with circumstances such as long possession and long acquiescences, the fact of a permanent building being allowed to be erected without objection, may warrant an inference in favour of a permanent building, so there are circumstances which may go far to weaken the force of that inference.”⁵

And similarly in another case the Privy Council considered the question as one of equitable estoppel in which it is incumbent

¹ *Rajah Sahab v. Pershad Singh*, 12 W. R., 6, P. C.; *Nilmani v. Mothura Nath*, 4 C. W. N., cxix.

² *Rungtal v. Wilson*, 1 L. R., 26 Cal., 204 (216).

³ *Id.*, p. 213; *Ismail Khan v. Joyjoon Bibee*, 4 C. W. N., 210 (222).

⁴ *Beni Madhub v. Joykissen*, 12 W. R., 495.

⁵ *Krishna v. Mir Mahomed*, 3 C. W. N., 255 (260); *Zeshwada Bai v. Ram Chandra*, 1 L. R., 18 Bom., 66; *Gungadhar v. Ainuddi Shah*, 1 L. R., 3 Cal., 900; *Maharani Beni Pershad v. Dutta Nath*, 26 I. A., 216.

upon the lessee to show that the conduct of the lessor, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that he had by plain implication, contracted that the lessee should have a perpetual right of occupation.¹ So in an English case followed by the Privy Council in the case last cited, it was observed "that if my tenant builds on land which he holds under me, he does not thereby in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and building when the tenancy has determined. He knew the extent of his interest, and it was folly to expend money upon a title which he knew would or might soon come to an end."²

A tenant for life does not render his possession adverse merely by giving notice to his landlord that he claims to hold on a perpetual or hereditary tenure.³

725. Notice when unnecessary.—This section provides for only those cases in which the parties have failed to contract about the giving of notice, before terminating the lease, or to which local law or usage does not apply. There are cases in which from the very nature of the grant such notice is to be implied, as where the lease specifies the term or event upon which the lease is to determine, as where the demise is for one year,⁴ or for any number of years,⁵ or till a particular day,⁶ or where the lease is to determine on the happening of a certain event, in all of which cases no notice to quit is required. Parties may also agree that the tenancy shall be determined without notice, in which case also no notice is necessary. Thus where it was stipulated that if the lessee "finds anything that may at all lead him to suspect that there is any embarrassment in the landlord" the lease would be put an end to it was held that the notice having been expressly dispensed with, could not be insisted upon.⁷ So also where the lease is limited by the happening of a certain event or fact as where the lease is given during the joint lives of A and B,⁸ or during the continuance of a partnership,⁹ or where it is given in lieu of service.¹⁰ A person suffered to remain in possession, as for example, tenants-at-will, or on sufferance and intruders, require no notice.

"A notice to quit," says Woodfall, "is unnecessary to determine a strict tenancy at will."¹¹ But such tenancy must be duly determined by a demand of possession, or by entry, or by something

¹ *Beni Ram v. Kundan Lal*, 1 L. R., 21 All., 490, P. C.; overruling *Gopi v. Bisheshwar*, C. W. N. (1895), 100.

² *Ramaden v. Dyson*, L. R., 1 App. Cas., 120 (141); followed in *Beni Ram v. Kundan Lal*, 1 L. R., 21 All., 496, P. C.; *Fenner v. Blake* [1900], 1 Q. B., 426.

³ *Maharani Beni Pershad v. Dutta Nath*, 26 I. A., 216.

⁴ *Cobb v. Stokes*, 8 East, 358 (361).

⁵ *Messenger v. Armstrong*, 1 T. R., 54.

⁶ *Doe d. Godsell v. Inglis*, Taunt., 54.

⁷ *Bethell v. Blencove*, 3 M. & G., 119.

⁸ *Doe d. Broomfield v. Smith*, 6 East, 530.

⁹ *Doe d. Colnaghi v. Bluck*, 8 C. & P., 464.

¹⁰ *Doe d. Hughes v. Corbett*, 9 C. & P., 494.

¹¹ *Doe d. Tones v. Chamberlaine*, 5 M. & W., 14; *Doe d. Milburn v. Edgar*, 2 Bing. W. C., 498; *Doe d. Jones v. Jones*, 10 B. & C., 718; *Doe d. Hall v. Wood*, 14 M. & W., 682 (second point); *Doe d. Hollingsworth v. Stennett*, 2 Esp., 717.

equivalent, on or *before* the date of the plaintiff's alleged title in an ejectment.¹ Implied tenancies at will frequently change into tenancies from year to year, upon payment of rent, etc.,² in which case the usual notice to quit must be given. A tenant on sufferance is not entitled to any notice to quit, nor even to a demand of possession, before an ejectment can be maintained against him.³ But such a tenancy will easily change into a tenancy at will or into a tenancy from year to year, whereupon a demand of possession, or a regular notice to quit, will become necessary.⁴ If a man get into possession of a house to be let, without the privity of the landlord, and they afterwards enter into negotiations for a lease, but differ upon the terms, the landlord may maintain ejectment to recover possession of the premises without notice to quit.⁵ But possession should be demanded before action, to put an end to any implied tenancy at will, arising from the negotiations.⁶ A mortgagor who is suffered to remain in possession, or in receipt of the rents and profits of the property mortgaged, not being a tenant of the mortgagee, but in the nature of a bailiff to receive the rents, and thereout pay the interest, and keep the surplus for his own use,⁷ is not entitled to any notice to quit, nor even to a demand of possession, before ejectment.⁸ And where the plaintiff claims by title paramount to the tenancy from year to year notice to quit is unnecessary.⁹

Where there is a local custom or usage regulating the giving of notice, effect must be given to it, for in law such custom shall be deemed to be implied in every contract. Such custom must however, if questioned, be established by sufficient evidence. So, again, where there is any express stipulation as to the notice to be given by either party to determine the tenancy, such notice, whether more or less than that usually required by law, must be given and will be sufficient;¹⁰ but anything less than for the stipulated period will be bad.¹¹ The "month" in the absence of the contrary, means a month reckoned according to the British Calendar.¹²

726. Notice when necessary.—In cases other than those above enumerated, notice must be given before determination of the lease. In the case of agricultural and manufacturing leases, the law presumes the lease to be from year to year since ordinarily from the very nature of the object for which the lease is

¹ See *Doe d. Nicholls v. M'Kay*, 10 B. & C., 731.

² *Clayton v. Blakey*, 8 T. R., 3.

³ *Doe d. Moore v. Lawder*, 1 Stark. R., 308;

Doe d. Leeson v. Sayer, 3 Camp., 8; *Doe d. Roby v. Maisey*, 8 B. & C., 767.

⁴ *Cole*, Ejectment, 88.

⁵ *Doe d. Knight v. Quigly*, 2 Camp., 505

⁶ *Cole*, Ejectment, 58.

⁷ *Trent v. Hunt*, 9 Exch., 14.

⁸ *Doe d. Roby v. Maisey*, 8 B. & C., 767 &c.

Woodfall, Landlord and Tenant (16th Ed.), 366.

⁹ *Cole*, Ejectment, 40.

¹⁰ *Doe d. Green v. Baker*, 8 Taunt., 261; *Doe d. Robinson v. Dobell*, 1 Q. B., 906; *Cole on Ejectment*, 81, 82.

¹¹ *Doe d. Peacock v. Raffan*, 6 Esp., 4; *Woodfall, Landlord and Tenant* (16th Ed.), 356.

¹² General Clauses Act, Act I of 1863, sec. 2 (4), now repealed, by Act X of 1897, see now sec. 3 (23) of the latter Act.

given, it is impossible to turn it to any profitable purpose within a shorter period. And for the same reason both in England¹ and this country six months' notice on either side is deemed essential. In the case of agricultural or pastoral holdings or market-gardens,² it is in England, moreover, provided that "where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of the Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same,"³ unless the parties agree otherwise.

In the case of a lease for any other purpose the section in the absence of anything to the contrary presumes a lease to be from month to month, terminable on the part of either party by fifteen days' notice expiring with the end of a month of tenancy. A tenant from year to year or from month to month has a lease for a year or a month as the case may be certain, with a growing interest during every year or month thereafter, springing out of the original contract and parcel of it.⁴ The section has been held to be inexhaustive, inasmuch as it does not provide for notice in the case of a yearly tenancy not being for agricultural or manufacturing purposes. Hence in a case where a tenancy was created by a *kabuliat* with an annual rent reserved, it was held by the Calcutta High Court following the rule of English law, that six months' notice terminating at the end of the year of the tenancy was essential, and that the want of the notice to quit before suit was a good ground for dismissing it.⁵ It appears, however, that six months' notice is not an inflexible rule, and there are cases to show that a "reasonable" notice is all that is required, that is to say, such notice as will enable the lessee to make some other arrangement, and to reap his crops; what is a "reasonable" notice being in every case a question of fact to be decided in each case, having regard to its peculiar circumstances, and the local customs as to reaping crops and letting land. And it is not necessary that such notice must expire at the end of the year.⁶ A notice to quit within thirty days is unreasonable, specially at a time when the crops are ripening. Where such a notice was given the Court refused to determine what would have been a sufficient notice, and to make a decree to

¹ *Parkes & Walker v. Constable*, 3 Wils., 25; *Right & Flower v. Darley*, 1 T. R.; 1 R. R., 169; *Doe & Shaw v. Porter*, 3 T. R., 13; 1 R. R., 626; *Doe & Martin v. Watts*, 7 T. R., 85; 4 R. R., 387; *Doe & Pitcher v. Donovan*, 1 Taunt., 555; *Goode v. Howell*, 4 M. & W., 198; cited in *Westfall, Landlord and Tenant* (16th Ed.), 358.

² Secs. 64, 61, Agricultural Holdings Act, 40 & 47 Vic., Ch., 61.

³ Sec. 83, Agricultural Holdings Act, 1883, 46 & 47 Vic. Ch., 61.

⁴ *Cattley v. Arnold*, 28 L. J., Ch., 352.

⁵ *Kishory Mohun v. Nund Kumar*, 1 L. R., 24 Cal., 720; see also *Rajendronath v. Bassider*, 1 L. R., 2 Cal., 146; *Abdullah v. Pakkeri*, 1 L. R., 2 Mad., 346.

⁶ *Jagut Chunder v. Rup Chand*, 1 L. R., 9 Cal., 48; *Radha Gobind v. Rakhal Das*, 1 L. R., 12 Cal., 82; *Bidhumukhi v. Keshrut-ullah*, ib., 98; *Kali Kishen v. Golam Ali*, 1 L. R., 13 Cal., 8; *Digambar v. Jhari Mahbo*, 1 L. R., 20 Cal., 761.

take effect at a future date on the basis of such notice.¹ In another case a ten days' notice was held to be not a sufficiently reasonable notice on which a landlord could maintain a suit in ejectment.² In Bombay the rule of six months' expiring with the year of the tenancy seems to have been consistently followed in a number of reported cases. Thus it was held in *Nanabhai v. Pestanji*³ that when there is no custom of the country to the contrary, six months' notice to quit is proper notice, and this period must have elapsed before the plaint is filed, for the time occupied in the suit before decree cannot be counted.⁴ This view of the law was followed in several other cases,⁵ which also maintain that the notice so given must end with the cultivating season. The effect of notice is to determine the tenancy, and if the tenant therefore continues to remain in possession after the expiration of the notice, he is not only liable to ejectment but also for damages for wrongful possession.

727. Requirements of valid notice.—The object of notice being to determine the lease, it is necessary that it should fulfil certain conditions. The section for example, directs that it should be (1) in writing, (2) that it should be signed by or on behalf of the person giving it, and (3) that it must be delivered to the addressee or in his absence to one of his family or servants on his behalf, failing which it may be affixed to a conspicuous part of the property. To these conditions must be added the following: (4) The notice must be clear and unambiguous. (5) It must designate the proper time. (6) It must expire with the year or month of the tenancy.

728. In the first place a notice to quit must be in writing, and thus, in this respect, it differs from the type of notice defined in sec. 3, and the English

law where a parol notice is admissible and is held to be generally sufficient.⁶ It is apprehended that the notice may either be given in the language of the addressee or in such other language as can be conveniently deciphered in the neighbourhood. Secondly, the notice must be signed either by the person giving it, or by some one on his behalf. The term "signed" is used generically, and would

also include "mark" with its grammatical variations and cognate expressions.⁷ It signifies the writing of a person's name by himself or by his authority with the intention of authenticating a document as being that of the person whose name is so written.⁸ The notice may be given by either the person himself or some one on his behalf. Of course this does not imply that any one whether duly empowered or not may give notice to the other party. It is apprehended that what is really intended by the section is that

¹ *Jubraj Roy v. Mackenzie*, 5 C. L. R., 281.

² *Ram Rotton v. Nitro Kally*, I. L. R., 4 Cal., 339.

³ 6 B. H. C. R. (A. C.), 31.

⁴ *Nanabhai v. Pestanji*, 8 B. H. C. R., 31.

⁵ *Narayan v. Kashie*, I. L. R., 6 Bom., 67;

Pandurang v. Yednashwar, ib., 70.

⁶ *Doe d. Ld. Macartney v. Crick*, 5 Esp., 106; *Timmins v. Rawlinson*, 3 Burr., 1608.

⁷ See sec. 3 (52), The General Clauses Act (Act X of 1897).

⁸ *Emp. v. Khetter Mohan*, 4 C. W. N., 440.

the notice may be given by either the party himself or some one

2. *By whom given.* who is empowered or entitled to act on his behalf, such as his agent, heir, executor or administrator, assignee or partner. In England notice may be given by the general agent, but not by a special agent unless he is empowered expressly to give it,¹ and it has been held that if the person giving notice had no authority to give it, at least at the latest when it begins to operate, a subsequent recognition by the principal would not validate a document which had no legal inception, and which he could as well have repudiated if it had suited him.² But where the notice given by an authorized agent is acquiesced in by the principal,³ or where the agent makes untrue representations on the faith of which the addressee is induced to act, he cannot afterwards be permitted to repudiate the act of his agent. As has been observed by Lord Cranworth, L. C., in the leading case of *Ramsden v. Dyson*⁴:—"If, indeed, the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and, knowing this, allows the persons so dealing to expend money in the belief that the agent had an authority which, in fact, he had not, it may be that in such a case a Court of Equity would not allow the principal afterwards to set up want of authority in the agent. But this equity, whenever it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal." In other words "if the principal's representations or acts give to the agent the appearance of an authority larger than the agent actually possesses, the principal may be bound by such of the agent's acts as, although beyond the line of the agent's actual authority, are still within the margin of his ostensible or apparent authority."⁵ The notice given by the agent must be given in the name of, or on behalf of, the principal, and this is specially so in the case of an agent having a limited authority only.⁶ Thus a notice given by an agent in the names of *W* and *B* and others, is valid as a notice from *W* and *B* only.⁷ Besides the agent a person entitled to the immediate reversion, *e.g.*, heir, assignee, executor or administrator, or any subsequent owner deriving title through or under the party giving the notice may avail himself of it.⁸ "A subsequent mortgagee whose mortgage is *subsequent* to the commencement of a tenancy from year to year created by the mortgagor is an assignee of the reversion, and he may give the tenant the usual notice to quit."⁹ But a prior mortgagee need not give any

¹ *Jones v. Phipps*, 3 Q. B., 305.

² *Doe d. Rhodes v. Robinson*, 8 Bing. N. C., 577; *Doe d. Lyster v. Goldwin*, 2 Q. B., 143 (148); *Doe d. Fisher v. Cuthell*, 5 East, 491 (496).

³ Sec. 237, Indian Contract Act (Act IX of 1872); sec. 115, Indian Evidence Act (Act I of 1872).

⁴ 1 H. L. C., 129 (158).

⁵ *Byles on Bills* (4th Ed.), 87.

⁶ *Buron v. Denman*, 3 Exch., 188.

⁷ *Doe d. Bailey v. Foster*, 3 C. B., 215.

⁸ *Woodfall, Landlord and Tenant* (16th Ed.), 806.

⁹ *Burrows v. Gradin*, 1 D. & L., 218 (218); *Ransom v. Eick*, 7 A. & E., 451; *Burton v. Dickenson*, 17 L. T., 246.

notice to quit."¹ Partners being agents to one another,² any one of them can give a valid notice on behalf of the firm. So also one of several joint tenants may give notice either on behalf of all,³ or only in respect of his own share.⁴ The character of joint tenancies as reflecting upon the question of notice has been thus stated by Lord Tenterden⁵:—"Upon a joint demise by joint-tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each, the share of each so long as he and each shall please, but that he holds the *whole of all* so long as he *and all* shall please; and as soon as any of the joint-tenants give a notice to quit, he effectually puts an end to *that* tenancy, the tenant has a right upon such notice to give up *the whole*, and unless he comes to a new arrangement with the other joint-tenants as to their shares, he is compellable so to do. The hardship upon the tenant, if he were not entitled to treat a notice from one as putting an end to the tenancy as to the whole, is obvious, for, however willing a man might be to be sole tenant of an estate, it is not very likely he should be willing to hold undivided shares of it; and if upon such notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint-tenants must have the same right. It cannot be optional on one side, and on one side only."⁶ The principle of these cases was applied by Jardine, J., in *Ebrahim v. Cursetji*,⁷ in which, however, the joint landlords were not Hindus, and it would appear that the same view would probably not apply where the joint owners are both Hindus, in which case the Indian decisions have usually treated the relation created by contract with several joint landlords as continuing until there exists a new and complete volition to change it.⁸ Thus in *Krishnarav v. Govind Trimbak*⁹ it was held that where a suit was brought by one of two co-sharers to recover land from a tenant, not only in the absence of, but against the express desire of the other co-sharer, the suit was not maintainable, the plaintiff being only entitled to sue jointly with his co-sharer, though he was the sole manager of the joint estate. And so in another case notice of enhancement, given by one of two joint khots, was held to be insufficient, it being observed by Westropp, C. J., that "if any one of several tenants-in-common, joint-tenants, or co-parceners, who is not acting by consent of the others as manager of an estate, is to be at liberty to enhance rent or eject tenants at his own peculiar pleasure, there manifestly would

¹ *Keech v. Hall*, 1 Doug. 21; Woodfall, Landlord and Tenant (10th Ed.), 267.

² Sec. 251, Indian Contract Act (Act IX of 1872).

³ *Doe v. Hughes*, 7 M. & W., 141.

⁴ *Doe d. Whymman v. Chaplin*, 3 Taunt., 120.

⁵ *Doe d. Aplin v. Summervell*, 1 B. & Ad., 125 (140).

⁶ *Ib.*, p. 140; see also *Cutting v. Derby*,

2 W. Black Rep., 1075; *Doe d. Robertson v. Gardiner*, 12 C. B., 319; followed in *Ebrahim v. Cursetji*, 1, L. R., 11 Bom., 644.

⁷ 1, L. R., 11 Bom., 644.

⁸ *Ebrahim v. Cursetji*, 1, L. R., 11 Bom., 644 (647); West and Bühler's Hindu Law, Vol. II (3rd Ed.), 607, note (c).

⁹ 12 B. H. C. R., 85; following *Emanna v. Purshotam* (S. A., No. 379 of 1873).

be no safety for tenants, and it would be impossible for them to know how to regulate their conduct or whom to regard as their landlord."¹ And a similar view has been taken by the Calcutta High Court where Garth, C. J., observed "that quite apart from the English law, it seems to us that, according to the just and reasonable construction of a condition of this kind, where it is optional with several joint lessors to avail themselves of the condition (as to forfeiture) or not, one or more of those lessors cannot legally insist upon a forfeiture without the consent of the others."² And so the Full Bench of the same Court has in a suit for rent held that "it has been constantly held in this Court, and must be considered now as well established law, that each co-sharer may bring a separate suit against the tenant for his share of the rent. But in the absence of such an arrangement (that is, an arrangement between the tenant and the co-sharer) under which the tenant agrees to pay a portion of the rent to each co-sharer in respect of his separate share, it is equally clear that no such suit can be maintained."³ The principle of these decisions no doubt rests upon the notion of joint family under the Mitakshara law, that no individual member can predicate of the joint property that he is the owner of a particular share, until an actual division between the several members has actually taken place, and, therefore, so long as the property is held jointly by the co-sharers, one co-sharer cannot act independently of the other co-sharers who are equally interested with him in all and every portion of the property.⁴ But this principle of the Hindu law should not be carried too far. And there are cases to shew that notice for enhancement issued at the instance of some of the persons entitled to the rent has been acted upon as good notice under sec. 14 of Bengal Act VIII of 1869.⁵

And it would appear that where notice has been given by some of the co-sharers, and the suit for rent is instituted in which some of the recusant co-sharers refuse to join, it would be unreasonable to deprive the co-sharers of the means of enforcing their just dues on that account, and that in such a case the proper course would be to decree that portion of the relief to which the plaintiffs may be entitled, making, if necessary, the recusant co-sharers defendants in the suit in order to bring all the parties before the Court.⁶ A pleader or solicitor being a recognized agent is, it would seem, competent

¹ *Balaji v. Gopal bin Raghu*, I. L. R., 3 Bom., 23 (35); citing *Krishnarav v. Gorind*, B. P. J. (1875), 60, reprinted as note to the above case.

² *Rensut Hossain v. Chorukur Singh*, I. L. R., 7 Cal., 470 (478); *Alum Manjee v. Ashad Ali*, 16 W. R., 133.

³ *Guni Mahomed v. Moran*, I. L. R., 4 Cal., 96, F. B.; followed in *Jadoo Shat v. Kadumbine*, I. L. R., 7 Cal., 150.

⁴ *Hoolash Koer v. Kasee Prosad*, I. L. R., 7 Cal., 369; following *Gounb Koeri v. Guja-*

dhur, I. L. R., 5 Cal., 219.

⁵ *Chuni Singh v. Hera Mahto*, I. L. R., 7 Cal., 633, F. B. (per Garth, C. J., Pontifex and Mitter, JJ.; Morris and McDonell, JJ., dissenting); followed in *Bidhu Bhushun v. Konaradit*, I. L. R., 9 Cal., 364.

⁶ *Chuni Singh v. Hera Mahto*, I. L. R., 7 Cal., 633 (638), F. B.; *Dwarkanath v. Kali Churn*, I. L. R., 13 Cal., 76. (In this case, however, all the co-sharers had served a joint notice, but on a suit being brought one of them withdrew.)

to give or receive notice on behalf of the party for whom he professes to act.¹ And to this must be added the recognized secretary of a corporation,² and a receiver generally empowered.³

729. Service of notice.—The notice must be served upon either the party himself for whom it is intended, or it may be served or delivered to one of his family or servants. Notice may be sent by post, the post office being an authorized agent for the transmission of letters.⁴ Hence where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, the cover containing the notice with an indorsement upon it purporting to be by an officer of the post office stating the refusal of the addressee to receive it, it was held that this was sufficient service of notice.⁵ And so in an English case followed in *Papillon v. Brunton*,⁶ it has been held that if the notice is delivered to the post office within the usual business hours on the 25th of March, that will be good notice for the 29th of September following, although the landlord does not actually receive it until the 26th.⁷ But in a later case it was held that a notice to quit must be posted so as to be delivered in due time in the ordinary course of the post.⁸ And so it has been enacted by the Agricultural Holdings Act,⁹ which provides that a notice may be sent "in a registered letter addressed to him (i.e., the person to whom it is to be given) there, and it will be deemed to be served at the time the letter containing it would be delivered in the ordinary course, and in order to prove service by letter, it shall be sufficient to prove that the letter containing the notices was properly addressed and posted."¹⁰ But sending a letter by post, it must be noted, creates only a presumption of service which may be rebutted.¹¹ Besides sending by post a notice may be delivered personally either to the addressee or some one on his behalf. In this respect the clause in its wording closely follows the English law, according to which a notice to quit *need not be served personally* on the tenant, but it is enough if it is left with his wife or servant,¹² such service affording presumptive evidence that the notice came to the hands of the tenant, the servant not being called.¹³ Under the section it appears to be the intention to primarily provide for the personal delivery or service of the notice on the party to whom it is addressed

¹ *Bhojabhai v. Hayem Sammel*, 1 L. R., 22 Bom., 764.

² *Doe d. Birmingham Canal Co. v. Bold*, 11 Q. B., 197.

³ *Wilkinson v. Colley*, 5 Burr., 269d (2698).

⁴ *Roe v. Street*, 2 Ad. & E., 831.

⁵ *Jogendro Chunder v. Dwarka Nath*, 1 L. R., 15 Cal., 681; following *Lootj Ali v. Peary Mohun*, 16 W. R., 228; *Papillon v. Brunton*, 5 H. & N., 518; 20 L. J., Exch., 165.

⁶ 1 L. R., 15 Cal., 681.

⁷ *Papillon v. Brunton*, 5 H. & N., 518; 29 L. J., Exch., 265; Addison on Contracts (9th Ed.), 655; Roscoe on Evidence, 11, 929.

⁸ *Gresham House Estate Co. v. Rosa Grande Gold Mining Co.*, 5 W. N. (1870), 119.

⁹ 40 & 47 Vic., Ch. 61 (1888).

¹⁰ *Ib.*, sec. 28.

¹¹ Roscoe's Digest of Evidence (15th Ed.) 11, 929.

¹² *Papillon v. Brunton*, 5 H. & N., 518.

¹³ *Jones v. Marsh*, 4 T. R., 404.

failing which it may be made over to one of his family or servants at his residence, or as a last resort it may be affixed to a conspicuous part of the demised property. But when it is said that the notice may be delivered to one of the recipient's family, what is intended is that the member actually receiving it for the addressee must be an adult, or at least a person competent to act in this respect as an agent for the person for whom it is intended.

730. A notice may be served on the landlord's agent appointed for the management of the property. But a notice to quit, given to a mere collector of his rent, is insufficient.¹ So service of notice on the solicitor of the other party is sufficient.² So service on one of several joint tenants is *prima facie* sufficient for all of them.³ A corporation may be served through one of its officers, usually the Secretary.⁴ But publication of a notice in a local newspaper addressed to the tenant, under circumstances which even made it highly probable that the notice in question came to the knowledge of the tenant, is not sufficient without more, such proof of service as will suffice to terminate the tenancy.⁵ Where notice has once been delivered, either to the addressee's relative or servant, it becomes immaterial whether the addressee actually receives it or not.⁶ As Lord Hatherley, L. C., put it—"when once you constitute your servant your agent for that general purpose, service on that agent is service on you, he represents you for that purpose—he is your *alter ego*, and service upon him becomes an effective service upon yourself. . . . Therefore the fact that the agent who received the notice put it into the fire would liberate entirely the person who delivered the notice, but it would not liberate the receiver of the notice when once the agency was established, it would not avail him as a mode of escaping from the consequences of his having employed such an agent."⁷ A notice cannot be served by merely leaving it at the tenant's house without an explanation,⁸ or without proof that the person upon whom service has been made is a relative or servant of the addressee.⁹ But the mode and manner of service becomes unimportant if it is shewn that the notice had in fact reached the hands of the addressee. Thus service by slipping a notice under the door of the tenant's house has been held to be sufficient where it was shewn that the notice came to the tenant's hands before the commencement of the six months.¹⁰ It should be observed that service of notice by delivery to one of the addressee's family or servants should be made by delivering it at his residence, but if substituted service has become necessary, it is to be made by affixing it to a conspicuous part of the property. And

¹ *Pearce v. Boulter*, 2 F. & F., 133.

⁶ *Doe d. Nerille v. Dunbar*, M. & M., 10.

² *Bhojabhai v. Hayen Samuel*, I. L. R., 22 Bom., 754.

⁷ *Tanham v. Nicholson*, 5 App. Cas., 561 (568, 569).

³ *Doe d. Bradford v. Watkins*, 7 East, 561.

⁸ *Doe d. Buross v. Lucas*, 5 Esp., 158.

⁴ *Doe v. Woodman*, 8 East., 228.

⁹ *Doe d. Blair v. Street*, 2 A. & E., 828 (831).

⁵ *Chandmal v. Bachraj*, I. L. R., 7 Bom.,

¹⁰ *Alford v. Vickery*, Car. & M., 280.

so in an English case service on the tenant's wife, off the demised premises and without proof that it was her husband's residence, where she was then living with him, was held to be insufficient.¹ A notice to quit need not be attested, and if attested, the attesting witnesses need not be called to prove it.² It is not necessary to prove the signature to the notice, and the original may be proved by an examined copy or duplicate,³ without any notice to produce the original.⁴

731. A notice to be valid must be clear and certain so as to

(4) Notice must be clear and positive.

bind the party who gives it, and to enable the party who receives it to act upon it. It must not be couched in ambiguous and conditional language, but must state directly and without circumlocution that the party giving it will determine the tenancy after expiration of the period to be therein specified. "The notice," says Story, "must be explicit and positive. It must give the tenant an option of leaving the premises or entering into a new contract. But it need not be worded with the accuracy of a plea."⁵ And though, as a rule, the Courts listen with reluctance to objections to the form of the notice,⁶ still a notice containing such expressions as "if you are dissatisfied, you can give up possession,"⁷ or "unless you employ a larger number of workmen I shall determine your tenancy,"⁸ or "if you do not quit within a month from this, I will sue you for rent at an enhanced rate,"⁹ is clearly not a valid notice in law. But in an English case¹⁰ where the words were "I desire you to quit, or I shall insist on double rent," the notice was held to be good. So in *Bury v. Thompson* a notice by a tenant that he would leave the leasehold premises on a certain day, unless the landlord agreed in the meantime to a reduction of rent was held to be a good notice.¹¹ And in another case¹² where after the usual words to vacate and deliver up possession the document contained: "And should you retain possession of the premises after the date before mentioned, the annual rent will be . . . payable quarterly in advance," it was held that the words quoted did not invalidate the notice. And so in a case decided by the Bombay High Court where the notice was to the following effect:—"Therefore, within two days from the receipt of this notice meet us, increase the rent and give us a legal writing, or in default, on the 31st March 1892,

¹ *Doc d Blair v. Street*, 2 A. & E., 328 (351).

² Sec. 72, Indian Evidence Act (Act IX of 1872); see also sec. 26, Common Law Procedure Act, 1854, which runs thus:—"It shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

³ *Cole on Ejectment*, 100.

⁴ Sec. 66 (1), Indian Evidence Act (Act IX of 1872).

⁵ *Story on Contracts*, § 1300.

⁶ *Doc d Rodd v. Archer*, 14 East, 245.

⁷ *Shep. & Brown's Comm.* (5th Ed.), 254.

⁸ *Ib.*

⁹ *Bradley v. Atkinson*, 1 L. R., 7 All., 507; in appeal *ib.*, 390, F. B.; but *contra* in *Ahearn v. Bellman*, 4 Ex. D., 201; *Bury v. Thompson* [1895], 1 Q. B., 231, on appeal at p. 696.

¹⁰ *Doc d Mathews v. Jackson*, 1 Dougl., 175.

¹¹ L. R. [1895], 1 Q. B. 281, on appeal at p. 696.

¹² *Ahearn v. Bellman*, D., 201.

we shall keep present two good men and take full possession of the said land with all trees, &c., on that day, and no contention of yours in that matter will avail; and if you raise a contention we shall have recourse to a regular suit to obtain possession, and you will be responsible ..." it was held that the notice was a valid one. "The terms of the notice," observed Farran, C. J., "could not possibly, we think, have left them in doubt as to what was required of them. That to an ordinary mind would appear to be sufficient to terminate the defendant's existing tenancy on the day specified.¹ "It has been said and truly said," observed Cotton, L. J., "that a notice to determine the tenancy must be clear and unambiguous; but that does not at all mean that a notice otherwise sufficient is made insufficient by its being accompanied by something else."² But in a Full Bench case the Allahabad High Court had to consider the effect of a similar notice worded thus:—"If the rooms you occupy are not vacated within a month from this date I will file a suit against you for ejectment, as well as for recovery of the rents due at the enhanced rate." It was held that in the letter there was no intention expressed to terminate the tenancy. "It is an intimation," Petheram, C. J., observed, "on the part of the lessor that, if the rent should not be paid within a month's time from that date, he would bring a suit against the lessee. He merely tells the lessee to vacate the rooms or to pay the penalty. This is not a notice which can terminate the tenancy, and therefore the tenancy was not determined."³ In other words, according to the Allahabad High Court, a notice to quit must not be *optional*, i.e., give the noticee option to remain on if he accepts the alternative conditions. This view is in accord with that taken by the Calcutta High Court,⁴ and in the Central Provinces.⁵

732. Another requirement of a valid notice is that it must

(5) **Must designate proper time.**

designate proper time for determination of the contract. Hence a notice to quit "forthwith" or "from henceforth," or "to quit"

generally without referring to some distinct time would be invalid.⁶ But it would appear that a notice given by a tenant to quit "as soon as by law he might" would be more definite and therefore valid.⁷ And so also a notice to quit "at the expiration of the present year's tenancy,"⁸ or "at the expiration of the current year"⁹ or "at the

¹ *Kikabhai v. Kulu*, 1 L. R., 22 Bom., 241 (248); following *Janoo v. Brijoo*, 22 W. R., 548; *Henchunder v. Radha Pershad*, 23 W. R., 440.

² *Ahearn v. Bellman*, 4 Ex. D., 201; cited and explained by Straight, J., in *Bradley v. Atkinson*, 1 L. R., 7 All., 899 (908).

³ *Bradley v. Atkinson*, 1 L. R., 7 All., 899 (902), F. B.; followed in *Harbans v. Bholai*, 10 A. W. N., 175; and in *Upasia Koshti v. Jago Koshti*, 7 C. P. L. R., 150.

⁴ *Mohamaya v. Nilmadhab*, 1 L. R., 11 Cal., 533; doubting *Janoo Mundun v. Brijoo Singh*, 22 W. R., 548.

⁵ *Upasia Koshti v. Jago Koshti*, 7 C. P. L. R., 150.

⁶ *Goode v. Howells*, 4 M. & W., 199 (201).

⁷ *Ib.*

⁸ *Doe d. Gorst v. Timothy*, 2 Car. & K., 351.

⁹ *Doe d. Baker v. Wombwell*, 2 Camp., 550.

expiration of the term for which you hold the same,¹ would be sufficient. The time again must be so fixed that the notice must expire "with the end of a year or of a month of the tenancy."

788. Under the law there is no time fixed before which a notice may not be given; hence while it may be given at any time at the pleasure of the party giving it,² it would be invalid if it expire before or after but not coincidentally with the end of the year or month of the tenancy. Hence where the tenancy begins on a particular day, the notice to quit must expire on that day, and not on the next following day.³ Thus upon a tenancy from the 25th March, the notice must expire on the 25th March and not on the 26th March. In England where tenancies commence on feast days, the notice to quit made to expire on the corresponding feast days is held to be sufficient, although the period may fall short of the requisite number of days.⁴ But this is perhaps more due to custom than to the force of any enactment. But in this country there can be no doubt that at least a full 183 days notice is in the case of yearly tenancies absolutely essential, and must in every case be given. The necessity imposed by law that the notice must expire on the last day of the tenancy often creates mistakes consequent upon the difficulty frequently experienced in ascertaining the date of the legal commencement of the tenancy. It is suggested that where such date is unknown and cannot be ascertained, it is always safe to word the notice to quit "at the expiration of the current year of your tenancy which shall expire next after the end of one half-year from the service of this notice."⁵ But a notice requiring the lessee to quit *before* instead of *on* the expiry of the last day or month of the tenancy is not necessarily bad, if the meaning imported by the notice is otherwise sufficiently intelligible, and when it is so, verbal subtleties ought to be and are disregarded as out of place.⁶ Generally speaking where the lease is given on a particular day, it must be presumed to commence from that day, if it is the day from which rent is payable. But if rent is paid for the broken period to the end of the month, and then it is paid from month to month, the tenancy must be taken to have commenced not on the day when the tenant first entered, but from the commencement of the ensuing month.⁷ And where different parts of the demised premises were entered upon at different times, the notice should be to quit at corresponding periods.⁸

¹ *Doe d. Milnes v. Lamb*, Ad. Eject, 272; cited in Woodfall, Landlord and Tenant (16th Ed.), p. 378.

² *Per Tyrrell, J.*, in *Bradley v. Atkinson*, 1. L. R., 7 All., 899 (904).

³ *Ismail Khan v. Joygoon Bibee*, 4 C. W. N., 210 (218); *Kishori Mohun v. Nund Kumar*, 1. L. R., 24 Cal., 720; *Page v. More*, 15 Q. B. D., 684.

⁴ Woodfall, Landlord and Tenant (16th

Ed.), p. 372.

⁵ *Doe d. Digby v. Steel*, 3 Camp., 117; *Hirst v. Horn*, 6 M. & W., 398; *Doe d. Williams v. Smith*, 5 A. & E., 350.

⁶ *Ismail Khan v. Joygoon Bibee*, 4 C. W. N., 210 (218), following *Sidebotham v. Holland* L. R., [1895], 1 Q. B., 378.

⁷ *Doe d. King v. Grafton*, 18 Q. B., 496.

⁸ Woodfall, Landlord and Tenant (16th Ed.), p. 374.

784. Waiver of notice.—A notice to quit may be waived by suffering the tenant to continue in possession after the expiration of the lease,¹ by accepting rent from him for his continued occupation or by levying distress for such rent,² or by other acts which lead to the inference that the parties have consented to continue the relation.³

[For a further commentary on the subject see secs. 112 & 113.]

785. Denial of title.—And where the tenant has prior to the suit denied the landlord's title, the latter can sue to eject him without giving him any notice;⁴ but not where the tenant while admitting his landlord's title claims to be a permanent tenant,⁵ or contends the land to be not liable to separate assessment.⁶ But disclaimer of a landlord's title in the pleadings after the suit is brought does not of itself determine the tenancy and render notice to quit unnecessary.⁷

786. Section not retrospective.—The section does not apply to suits instituted before the Act came into operation.⁸ Prior to the enforcement of the Act, a tenant other than a monthly tenant, holding over on the terms of his lease, was entitled to reasonable notice,⁹ and according to the Bombay High Court, in the absence of usage or contract to the contrary,¹⁰ six months' notice¹¹ is deemed to be sufficient.

787. Objection to notice taken in appeal.—The objection as to the necessity of notice to quit may be taken at any time even in second appeal.¹²

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

¹ See sec. 113; *Shitale Dei v. Ajudhia Prasad*, I. L. R., 10 All., 18; *Taylor v. Willdin*, 3 Ex., 803; *Zouch v. Willingale*, 1 H. Bl., 211.

² *Goodright v. Cordwint*, 6 T. R., 219.

³ See sec. 113, post; *Sparrow v. Hawkes*, 2 Esp., 505.

⁴ See sec. 111 (g) (2), post; *Agar Chand v. Rakhna Hanmunt*, I. L. R., 12 Bom., 678; *Lala Gopal v. Bai Motan*, I. L. R., 17 Bom., 681; *Dodhu v. Mahadav Rao*, I. L. R., 18 Bom., 110; *Subbarao v. Nataraja*, I. L. R., 14 Mad., 98; *Unhamma v. Vaikanta*, I. L. R., 17 Mad., 218; *Haidri Begum v. Nathu*, I. L. R., 17 All., 45.

⁵ *Subba v. Nagappa*, I. L. R., 12 Mad., 353; *Abu Bakar v. Venkatramana*, I. L. R., 18 Bom., 107; *Dodhu v. Mahadav Rao*, ib.,

110; but contra in *Shanoba v. Balya*, B. P. J. (1878), 66; *Mahipat v. Lakshman*, 2 Bom. L. R., 228.

⁶ *Asanullah v. Mohini Mohan*, I. L. R., 26 Cal., 789.

⁷ *Amabai v. Bhau*, I. L. R., 20 Bom., 759.

⁸ *Amabai v. Bhau*, I. L. R., 20 Bom., 759.

⁹ *Ram Lal Patak v. Dina Nath*, I. L. R., 23 Cal., 200.

¹⁰ *Balkrishna v. Jesha*, I. L. R., 19 Bom., 150.

¹¹ *Amabai v. Bhau*, I. L. R., 20 Bom., 759; *Ramchandra v. Dowlatji*, B. P. J. (1880), 10; *Yadneshwar v. Rama*, B. P. J. (1881), 180; *Balaji v. Bhikaji*, ib., 181.

¹² *Abdulla v. Subbarayyar*, I. L. R., 2 Mad., 346; *Dodhu v. Mahadav Rao*, I. L. R., 18 Bom., 110.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

738. Analogous law.—The language of this section closely corresponds with sec. 17 (d) of the Indian Registration Act,¹ to which the provisions of this section are declared to be supplemental.² The section has been extended to every cantonment in British India.³

In England, writing is not necessary in the case of a lease for three years or less, but for more than three years no lease can be made except by a deed.⁴

It will be observed that under the proviso to sec. 17 (d) of the Registration Act, the Local Governments are empowered to exempt from the operation of the registration clause any leases executed in any district, or part of a district, the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees. But since no such proviso has been annexed to this section, the effect of the latter is to nullify the effect of the proviso, in the cases of leases falling within its purview.⁵

739. Principle.—The object of this section in requiring registration is the same as of secs. 54 and 59, which also provide for compulsory registration in similar cases. Its effect is to make registration, and, therefore, writing necessary in the case of every lease, excepting only those which are made for a term of one year or less, or those deemed to be from month to month as provided in the last section. The necessity of registration in the case of lease is, it must be observed, not dependent upon the value of the interest conveyed as in the case of sale or mortgage, but upon the *term* of the demise, it being in a lease difficult to ascertain the value of the interest so as to afford a reasonably certain data for the purpose of registration. This being the case, a lease of immoveable property of whatever value, if given for one year or less, may be made by an unregistered assurance, although registration would have been compulsory if the transaction had assumed any other form of transfer. As certain leases, as for example, the *zur-i-peshgi* lease, are looked upon as falling within the category of mortgage, this distinction is often of importance when the character of the transaction has to be clearly ascertained.

740. Meaning of words.—“*From year to year*”: i.e., a lease continuing from year to year, the landlord having no option to determine it at the end of the year. “*Or reserving yearly rent*”: i.e., where a lease is given for no fixed term but an annual rent is agreed upon.

¹ Act III of 1877.

² Sec. 4, *ante*.

³ Sec. 82, Act XIII of 1859.

⁴ Sec. 3, Real Property Act, 1845 (8 & 9

Vic., Ch. 106), secs. 1 and 2, Statute of Frauds (29 Car., 2 Ch., 3).

⁵ *Vairananda Nadar v. Miyakan Rowter*, 1. L. R., 21 Mad., 109.

741. Compulsorily registrable lease.—This section read conjointly with sec. 17 (d) of the Indian Registration Act¹ makes registration of all leases excepting those for a year or less, or from month to month compulsory. A lease is held to be from year to year, when the lessor has at the end of the year no option to determine it.² Hence a lease, for one year certain, containing an expression, on the tenant's part, of readiness to hold the land longer at the same rent if the landlord should desire it, is a lease for a term not exceeding one year,³ and so a lease for not more than three years, extensible at the option of the landlord, was held to be a lease for no more than three years, although, if the same had been extensible at the option of the tenant, it would be otherwise.⁴ So where a lease contained the following stipulation:—"I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court," it was held that the lease was for one year only, and as such did not require registration.⁵ And it has been generally laid down that, if in a document for which the term of one year is specially prescribed, any subsequent words are used for the continuance of possession, they are to be considered to appertain to the future consent of the parties, and cannot in any way affect the actual fixed term or create a fresh right, as based on contract, in favour of any party.⁶ But in construing leases regard must be had to the fact that the same document may create both a lease for a definite term and an agreement to take effect thereafter. Thus in a case⁷ where *A* agreed to let and *B* to take lease of a house for twelve months, but the document further provided "with right at the end of that term for the tenant, by a previous month's notice, to remain on for three years and a half more," Lord Cairns in delivering judgment said:—"Whereas there is not anything to be done by the tenant in the first part of the agreement to create a demise, in the second part something has to be done by him before that part takes effect, and until that is done it is impossible to tell whether a tenancy shall come into force or not. I think, therefore, that it is absolutely necessary to divide the contract into two parts. I think the agreement is an actual demise, with a stipulation superadded that if, at his option, the tenant gives the landlord a notice of his intention to remain, he shall have a renewal of his tenancy for three years and a half."⁸ This case has been followed by Trevelyan, J., in *Boyd v. Kreig*,⁹

¹ Act III of 1877.

² *Hand v. Hall*, 2 Ex. D., 318; on appeal, *ib.*, 355.

³ *Apu Budgavda v. Narhari*, 1 L. R., 3 Bom., 31.

⁴ *Hand v. Hall*, 2 Ex. D., 318; on appeal, *ib.*, 355; *Manna v. Dadan*, 9 C. P. L. R., 88.

⁵ *Khayali v. Husain Bakhsh*, 1 L. R., 8 All., 198.

⁶ *Apu Budgavda v. Narhari* 1 L. R.,

3 Bom., 21.

⁷ *Hand v. Hall*, 2 Ex. D., 355.

⁸ *Hand v. Hall*, 2 Ex. D., 355; cited and followed in *Boyd v. Kreig*, 1 L. R., 17 Cal., 548 (555); dissenting from the contrary held in *Bhobani v. Shibnath*, 1 L. R., 13 Cal., 113; followed also in *Ratnasabapathi v. Vencatachalam*, 1 L. R., 14 Mad., 371.

⁹ 1 L. R., 17 Cal., 548.

where in a lease for one year, the option of renewal was sought to be proved by the production of the correspondence which had passed between the parties, consisting of a letter written by the lessee to the lessor in which he had said :—"So I expect you will give me the option of renewal for another year . . . on same terms" to which the lessor had replied "you may have the option of retaining it (the flat) for another year on the same terms, but not for a shorter period." It was held that the correspondence contained a complete agreement independently of the draft and engrossed lease, of which it could not be regarded as a part, and that, therefore, it was admissible in evidence only after it was stamped and the penalty paid as required by law.¹ The position of the lessee holding over after the expiration of the lease has been held to be that of a tenant-at-will, until his extended lease is renewed.² The tenant is therefore liable to pay rent for this period, and the landlord has a right to distrain for his rent.

742. Lease or agreement for lease.—The distinction between a lease and an agreement to let must be clearly marked, since while the latter requires no registration, the former, certain leases excepted, can only be made by a registered instrument. The question is essentially one of construction and intention of the parties. If the words used are such as "I demise," or that the lessee "shall hold and enjoy," "an undertaking to cultivate or occupy,"³ or other similar words of present demise, the document will no doubt be construed to be a lease.⁴ But if the intention of the parties was not to create immediately the relation of the landlord and tenant, or that something more has to be done before the relation commences, it should be presumed that the instrument was intended to operate only as an agreement and not a lease.⁵ So, where a stipulation is contained in the instrument, importing that something ulterior to the agreement is to be done by way of a regular lease, this is evidence of an agreement only.⁶ In construing the document, regard must be had to the paramount intention therein expressed, the conflicting expressions being disregarded.⁷ Thus the word "agree" used in a deed does not necessarily exclude the inference of a present demise,⁸ and so, on the other hand, an express stipulation for a power of distress, until the lease is granted, does not necessarily operate to create a present demise.⁹ For the purpose of ascertaining the real intention of the parties, the Court may look at the nature of the property,¹⁰ and the circumstances

¹ *Boyd v. Kreig*, 1 L. R., 17 Cal., 548.

² *Morton v. Woods*, 3 Q. B., 668 (667); followed in *Jaggivandas v. Narayan*, 1 L. R., 8 Bom., 498; *West v. Fritche*, 3 Ex., 216; *Dancer v. Hastings*, 19 Bro. Moo., 84; *Jolly v. Arbutnot*, 28 L. J. (Ch.), 547.

³ *Apu Budgavda v. Nurhart*, 1 L. R., 3 Bom., 21.

⁴ *Harrington v. Wise*, Cro. Mitz., 486;

Stainforth v. Fox, 7 Bing., 592.

⁵ *Doe d. Coore v. Clare*, 2 T. R., 789; *Doe d. Wood v. Clarke*, 7 Q. B., 211.

⁶ *Rawson v. Eicks*, 7 Ad. & E., 451.

⁷ *Per Tindal, C. J.*, in *Pinero v. Judson*, 6 Bing., 210.

⁸ *Stainforth v. Fox*, 7 Bing., 592.

⁹ *Hayward v. Haswell*, 6 Ad. & E., 265

¹⁰ *Osborne v. Wise*, 7 C. & P., 761.

surrounding the instrument,¹ but not to the subsequent acts of the parties,² nor to any other extrinsic circumstances.³ If a deed may be susceptible of two constructions, the one consistent and the other inconsistent with the intent of the parties, the Courts will put such a construction on it as to give effect to the intent.⁴ Hence, a document failing to be construed as a lease, may still be admitted as an agreement for a lease, and it appears to be the tendency of English decisions to construe a writing as a valid agreement for a lease rather than a void lease.⁵

743. In this country the English rule has on this point been invariably followed. Thus in a case where the instrument, dated 8th October 1882, ran: "I agree to give you a contract for my property, at the rate of 17 per cent. per month, more than it realizes now. *The rent to commence from 1st October 1882 . . .* This contract to run for four years certain. A *pucka* agreement to be drawn by me, which must be stamped and registered at your expense:" it was held that the words were sufficiently indicative of a present demise, although the deed contained a provision that a formal lease should be subsequently executed and registered, and that the document was, in fact, a lease and as such it required registration.⁶ And similarly where the lessor received a sum as earnest-money and executed a *baena puttro* (deed of earnest-money) in which he promised to execute the *pottah*, and provided that if he failed to execute it, the first-named deed was to be considered a *pottah*, it was held in a suit on the *baena puttro* that the deed was a *pottah* and should have been registered.⁷ But it has been held by the Privy Council⁸ that an *ikrarnama* conjointly executed by certain tenants promising to sign and have registered *kabuliats* in respect of excess lands found to be in their possession on measurement, does not require registration, under sec. 17, cl. (h) of the Registration Act. A document executed by the lessee promising to pay a portion of the *salami* on the day when possession should be given under the duly executed prior lease, is not a "lease or agreement to lease" within the meaning of sec. 3 of the Registration Act so as to require registration.⁹ And to the same class belongs a written agreement by the landlord promising to reduce the rent of his lessee.¹⁰ But a *bhadekhat* being an agreement between lessee and

¹ *Doe d Pennington v. Taniere*, 12 Q. B., 998 (1018).

² *Doe d Morgan v. Powell*, 7 M. & Gr., 980 983 (992); but *contra* in *Chapman v. Bluck*, 4 N. C., 187.

³ *Flinn v. Calow*, 1 M. & G., 589.

⁴ *Solly v. Forbes*, 4 Moo., 448.

⁵ This change has been since the passing of 8 & 9 Vic., Ch. 106, sec. 2, which favours such a construction; see *Brnd v. Roeling*, 30 L. J. Q. B., 237; *Parker v. Taswell*, 27 L. J. (Ch.), 812; *Woodfall, Landlord and Tenant* (16th Ed.), 128; *Roscoe's Digest of Evidence*

(15th Ed.), Vol. II, pp. 922, 925.

⁶ *Purmanand Das v. Dhursey*, I. L. R., 10 Bom., 101.

⁷ *Nund Ram v. Mannoo Bibee*, 10 W. R., 77.

⁸ *Pertap Chunder v. Mohendranath*, I. L. R., 17 Cal., 291, P. C.; so held also in *Anjad Ali v. Ala Baksh*, 9 W. R., 587; *Eur Chunder v. Wooma Soondures*, 23 W. R., 170; *Ram Coomar v. Kishori*, I. L. R., 9 Cal., 68.

⁹ *Kedarnath v. Surendro Deb*, I. L. R., 9 Cal., 865.

¹⁰ *Satyesh Chunder v. Dhunput Singh*, I. L. R., 24 Cal., 20.

a lessor, in the nature of a counterpart of a lease, would require to be registered.¹ But a *dowl fehrist* (or list of holdings and rates of rent of the ryots) being merely a memorandum of the rates of rent agreed upon, to which the tenants affix their signatures in token of such agreement, is not a contract and does not require to be registered. It is no more a contract than *chittas* or measurement papers.² And to the same class belong entries as to the area of land and rent payable thereon by each tenant, made in the lessor's book, although made to sign by the lessee.³ And similarly an application to take a lease of certain lands on certain terms, made by the lessee to the lessor, is no more than a proposal, but if the lessor accepts the application by endorsing the word "granted," attested by his signature, there being both a proposal and acceptance necessary to constitute a contract, the transaction becomes then a lease.⁴

744. The condition in a lease containing the words "this to remain in force until another *patta* is granted" clearly indicates an intention to create or regulate the terms of a tenancy beyond the year expressly stipulated and from year to year, thus necessitating registration.⁵ Lease of a *hat* being a benefit arising out of land cannot be verbal and would require registration.⁶ A lease of a dwelling-house at a certain monthly rent, though for an indefinite period, would not require registration.⁷ Thus where the lease ran thus: "Whereas I having taken land from *KH*, and building a shop thereon at my own cost I promise and give it in writing that I will pay to *KH* every month a rent of three annas a month. In any month in which I shall fail to pay the rent, *KH* will be competent to have the shop vacated by me:" it was held that the lease was not within the contemplation of the present section and did not require to be either registered or to be in writing.⁸ Similarly in another case which went up before the Full Bench of the Allahabad High Court the lease ran thus:—"I Pancham having taken (premises described) on a monthly rent of one and a half annas for my personal use as a dwelling, it is agreed that I shall pay the aforesaid rent month by month; secondly, if I find it necessary to erect any fresh buildings on the aforesaid premises, I shall do so from the materials found on the spot at my own expense; the owner of the premises shall have nothing to do therewith; should I neglect to pay the aforesaid rent, the owner shall be at liberty to realize the same and have the premises vacated, and at the same time I shall have no claim as regards the buildings erected as

¹ *Moro Vilhal v. Sukaram*, 5 B. H. C. R. (A. C.), 92.

² *Gunga Persad v. Gogun Singh*, 1 I. L. R., 3 Cal., 332 (334); see also *Karticknath v. Khanum Singh*, 1 C. L. R., 338.

³ *Narain Coomary v. Ram Krishna*, 1 I. L. R., 5 Cal., 264.

⁴ *Syed Saifur Razi v. Anwar Ali*, 1 I. L. R., Cal., 763, K. B.; *Luljha v. Negroo*, ib., 717.

⁵ *Venkatachellam v. Andam*, 1 I. L. R., 3 Mad., 256.

⁶ *Surendra Narain v. Bhai Lal*, 1 I. L. R., 32 Cal., 752.

⁷ *Chaman Bai v. Haidar Ali*, 9 C. P. L. R., 87.

⁸ *Khairat Husain v. Maheshri Prasad*, 17 A. W. N., 69.

aforesaid by me . . . and if the landlord finds it necessary to have the premises vacated he shall give me fifteen days' prior notice . . ." it was held by the majority of the Full Bench that the lease was not for a period exceeding one year, and did not therefore require registration.¹ But the terms of the following instrument clearly call for registration. Thus where it recited "I have given to the lessee 13 bighas 10 biswas of land at the rent of Rs. 4 or Rs. 5 per bigha, for a period from 1282 to 1284 Fasli, namely, for a term within three years. At the time of sowing indigo I will give the land for sowing indigo from 15th Jaith or 15th Chaith, should I fail. . . I shall pay damages . . ." it was held that taken as a whole the document operated as a lease for three years and therefore it should have been registered.²

745. A *zur-i-peshgi* lease granted for the period of one year certain, but with a stipulation that unless the loan were repaid within that time it should continue in force, is a lease for a term exceeding one year, and therefore should be registered.³ A *kabuliat* by itself does not require registration,⁴ but where it contains other matter it may amount to a lease and would then be bad for want of registration. Thus where a *kabuliat* extending for 27 months, gave as a reason for the promise it contained to pay money: "I have taken the Sarlya bill for the purpose of digging earth and stone therein, and removing the same," which was followed by a statement of the area of the land, and the rates per bigha, and only one payment was stipulated for to be made in addition to the cash paid down, it was held that the document could not be admitted being not registered.⁵ And so where a document purporting to be only a *Yaddast* assigned to the transferee the right to "cut and enjoy the trees, etc.," growing on a certain land for a period of four years from its date, it was held by the Full Bench of the Madras High Court⁶ that the document was not a lease inasmuch as to constitute such a transfer it is essential that *exclusive* possession of the property which is the subject of the transfer should be intended to be vested in the transferee,⁷ but since the *Yaddast* did convey an interest in immoveable property its registration was essential.⁸ But where the owner of certain land exchanges it for certain other land, but takes a lease for one year of the former land, the fact that such a lease recites the fact of the exchange of the lands does not evidence the exchange, and as such create a title in land. Nor does the fact that the rent reserved under the lease is more than Rs. 200 create

¹ *Hanso v. Har Narala*, 6 A. W. N., 115, F. B.

² *Martin v. Ramlal*, 2 A. W. N., 18; distinguishing *Shoo Dial v. Prtag Dat*, I. L. R., 3 All., 33.

³ *Shobani v. Shibnath*, I. L. R., 13 Cal., 113.

⁴ See *supra*.

⁵ *Dhondiraj v. Curaji*, B. P. J. (1874), 74 (a case under secs. 2, 17 of the old Registration Act (Act XX of 1860); see also *Hiralal v. The Collector of Surat*, B. P. J. (1876), 36).

⁶ *Seent Chettiar v. Santhanathan*, I. L. R., 20 Mad., 58. F. B.

⁷ *Id.*, per Subramania, J., p. 64.

⁸ *Id.*, per Collins, C.J., p. 63.

an interest in land of Rs. 100 and more in value so as to necessitate its registration.¹

746. Lease for no fixed term.—A lease for so long as the lessee or tenant continues to pay the stipulated rent is a lease not limited to a year, and must be registered.² But where the lessee is liable to be evicted at fifteen days' notice, the mere fact that the land is given on a specified yearly rent, does not make the tenancy anything more than a tenancy at will, and the document creating it would not therefore require registration.³ And so also where under a lease the lessee was to pay rent for "so long as you" (the landlord) "shall leave the land with me" (the tenant), although under the lease the tenant might claim possession for one year.⁴ Tenancy may be created, apart from any document, by the mere acceptance of rent, which could only be determined by notice or otherwise.⁵ Where such tenancy is constituted oral evidence would be admissible.

747. When a document, the registration of which is compulsory, has not been registered in accordance with law, it cannot be received in evidence,⁶ and the document having been rejected, no secondary or oral evidence can be allowed to be given in proof of the terms of the document,⁷ the result being that the contract cannot be proved at all. But in such a case if the tenant against whom an unregistered lease has been rejected, admits his relation, he cannot be allowed to evade his liability for rent, and at all events he is liable to pay for use and occupation.⁸ But the authorities are however by no means unanimous on the point, for in some cases it has been held that the document sued upon being rejected for want of registration, the plaintiff may still obtain relief on the defendant's admission,⁹ while other cases distinctly hold that apart from the document, the plaintiff can obtain no relief whatever.¹⁰ But there can be no doubt that a claim for obtaining relief for use and occupation requires no contract to support it, and consequently the rejection of a contract for want of registration cannot prevent the

¹ *Seetharama v. Bayanna*, I. L. R., 17 Mad., 275.

² *Sheo Gholam v. Budree Nath*, 4 N.-W. P. H. C. R., 80.

³ *Khuda Baksh v. Sheo Din*, I. L. R., 3 All., 406; *Ratnasabhapati v. Venculachalam*, I. L. R., 14 Mad., 271.

⁴ *Jagjivan Das v. Narayan*, I. L. R., 3 Bom., 493.

⁵ *Sonet Koor v. Himmat Bahadur*, I. L. R., 1 Cal., 391 (399), P. O.

⁶ Sec. 49, Indian Registration Act (Act III of 1877).

⁷ Sec. 91, Indian Evidence Act (Act I of (1872)).

⁸ *Lalun v. Sona Muni*, 22 W. R., 334; *Gaya Prasad v. Baijnath*, I. L. R., 14 All.,

176; compare also *Feshradabai v. Ramchandra*, I. L. R., 18 Bom., 66; *Chenbasappa v. Lakshman*, ib., 309; *Fulechand v. Kisan*, ib., 614; *Pramatha Nath v. Dwarkanath*, I. L. R., 23 Cal., 851; contra in *Mulji v. Lingu*, I. L. R., 21 Bom., 301.

⁹ *Venkatagiri v. Raghava*, I. L. R., 9 Mad., 142; *Nangali v. Raman*, I. L. R., 7 Mad., 226; dissented from in *Gaya Prasad v. Baijnath*, I. L. R., 14 All., 176; and cases cited, *supra*.

¹⁰ *Sonu Gurukul v. Rangammal*, 7 M. H. C. R., 13, following *Arunnchellum v. Olagappah*, 4 M. H. C. R., 312; *Nangali v. Raman*, I. L. R., 7 Mad., 226; *Gurunath v. Chendasappa*, I. L. R., 18 Bom., 745; see also *Mulji v. Lingu*, I. L. R., 21 Bom., 301.

relief from being given. And so in one case it has been held that where the lessee is let into possession, he cannot be treated as a trespasser, although his title may be infirm. He cannot therefore refuse to pay rent as for the use and occupation which under ordinary circumstances would be the same as the rent fixed by the invalid lease.¹ And similarly it has been in another case laid down that when the contract is rendered ineffectual for want of registration, the landlord is not debarred from giving other evidence of a tenancy and requiring the Court to adjudicate on his right to eject.² In one case an official liquidator sold, with the sanction of the Court, the remainder of a lease for a long term of years held by a bankrupt Company. A certain rent was reserved on the lease. No written assignment to the purchasers was ever executed, but the lease was handed over to them, and they were put in possession and remained in possession for some years. It was held that whether or not the assignment of the lease was invalid by reason of its not being in writing the purchasers of the Company's interest were liable to pay rent to the lessors for the period during which they had been in possession.³ But in all such cases the claim must be specifically laid for rent and in the alternative for use and occupation, for if the claim is made only for rent, no damages can be decreed for use and occupation.⁴

A document which might have been rejected if used as a lease, might still be admitted to prove only the contract in a suit for breach of contract to execute a lease, if the plaintiff uses it as no more than an agreement.⁵

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

Rights and liabilities of lessor and lessee.

A.—Rights and Liabilities of the Lessor.

- (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which

¹ *Gaya Prasad v. Baijnath*, 1 L. R., 14 All., 176.

² *Venkatagiri v. Raghava*, 1 L. R., 8 Mad., 142.

³ *Gaya Prasad v. Baij Nath*, 13 A.W.N., 25.

⁴ *Rachha Singh v. Upendra Chandra*,

1 L. R., 27 Cal., 289; following, *Lukher Kanto v. Sumceruddi*, 13 B. L. R., 248; *Surendra Narain v. Bhai Lal*, 1 L. R., 22 Cal., 752.

⁵ *Raja of Venkatagiri v. Narayan*, 1 L. R., 17 Mad., 466, F. B.

the former is and the latter is not aware, and which the latter could not with ordinary care discover :

- (b) the lessor is bound on the lessee's request to put him in possession of the property :
- (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

- (d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :
- (e) if by fire, tempest, or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

- (f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee

may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

- (g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :
- (h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth : provided he leaves the property in the state in which he received it :
- (i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :
- (j) the lessee may transfer absolutely, or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transference of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

Nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate

under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee :

- (k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :
- (l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :
- (m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :
- (n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :
- (o) the lessee may use the property and its products (if any) as a person of ordinary prudence

would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

748. Analogous law.—This section corresponds in its wording with sec. 55 declaring the rights and liabilities of buyer and seller. The law herein enacted is generally the same as in England, with which it has been noted and compared wherever necessary in the ensuing discussion.

749. Principle.—This section is subject to the private contract between parties and to the local usage, which according to the custom of the country is presumed to be implied in every lease unless expressly excluded: *expressum facit cessare tacitum*.¹ The section is not subject to any local law as sec 106, and hence it would appear that the provisions of the section are not subject to nor controlled by any local law, if any, to the contrary. The local usage to which the section gives way need not according to the Privy Council be ancient, uniform or have the notoriety of custom, "which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."² As an instance of a local usage overriding the provisions of the section may be given the practice of Calcutta tenants entitling them to remove their tiled huts or to dispose of them without the consent of their landlords.³ The force of usage is as well recognised

¹ "Express contract overrides an implied contract."

² *Juggomohun v. Manickchand*, 7 M. I. A., 68 (282).

³ *Parbutty v. Woomatara*, 14 B. L. R. (O. C.), 201; see also *Gopaul Mullick v. Anando Chunder*, *ib.*, 206 note.

in England where usage or custom is allowed similarly to override the law.¹ And according to the English cases too such a custom need not be necessarily ancient or immemorial,² nor need it be universal, for a common usage of the neighbourhood is sufficient.³ Where usage is pleaded, it is necessary to prove it as a fact. Local usage not only overrules the law, but may vary even most solemn written contracts,⁴ unless the latter expressly provide against it.

750. Meaning of words.—“*Disclose . . . any material defect:*” These words have been repeated from sec. 55 (1) (a). They mean such defect as renders the lease useless or almost so to the lessee. The defect, though otherwise material, would not here be enough, for it must be “*with reference to its intended use.*” “*Contract with the lessee,*” “*contracts binding on the lessee:*” The word “contract” in this connexion means stipulations or covenants entered into between the parties. “*The benefit of such contract:*” The same phrase occurs also in sec. 55 (2) last paragraph. “*If by fire or other irresistible force:*” i.e., *ris major*. “*Where a lease of uncertain duration, &c.*”: With this clause may be compared sec. 51, especially its last paragraph.

“*Nothing in this clause, &c.*”: This clause is reproduced from sec. 6 (i). For other clauses, and the meaning of terms used therein, reference must be made to the commentary below.

751. Rights and liabilities of the lessor and the lessee.—Although the section professes to prescribe the rights and liabilities of the lessor and the lessee, the section does not exhaust all the reciprocal rights and liabilities of the contracting parties. But it no doubt enumerates the principal incidents of a lease which may perhaps be more conveniently exhibited thus:—

(A) LESSOR.

Rights.

See Liabilities of the Lessee.

Liabilities.

- | | |
|--|--|
| (1) To disclose material defects. (a).
(2) To give possession. (b).
(3) To secure possession. (c).
(4) To recognize the lessee's transferee. (d). | (1) To disclose material defects. (a).
(2) To give possession. (b).
(3) To secure possession. (c).
(4) To recognize the lessee's transferee. (d). |
|--|--|

(B) LESSEE.

Rights.

(1) To accessions made during the lease. (d).

(2) To avoid lease when the property is destroyed. (c).

Liabilities.

(1) To disclose material fact enhancing the value of the lessor's interest. (k).

(2) To pay rent. (l)

¹ *Wingfield v. Bullison*, 1 S. L. C., 598.

² *Leigh v. Hewett*, 4 East, 100; *Dulby v. Hirst*, 1 B. & B., 224.

³ *Woodfall, Landlord and Tenant*, (16th Ed.), 792.

⁴ See sec. 1, para. 2, of the Indian Contract Act (Act IX of 1872); but see *Moothara v. India General Steam Navigation Co.*, 1 L. R., 10 Cal., 166 (1881), F. B.

*Rights—(contd.)**Liabilities—(contd.)*

- (3) To charge for repairs. (f).
 (4) And other payments made for the lessor. (g).
 (5) To move fixtures during the lease. (h).
 (6) To crops sown by him upon determination of a lease for an uncertain period. (i).
 (7) To transfer his interest in the lease. (j).

- (3) To restore the property leased in good condition. (m).
 (4) To inform lessor if a stranger assails his title. (n).
 (5) Not to commit waste.
 (6) Nor erect permanent structure. (p).
 (7) To deliver possession on expiry of term. (q) (cf. cl. m).

752. (a) To disclose material defect.—The provisions of this clause are almost identical with those of sec. 55, by which the vendor is bound to disclose to the vendee any material defect in the property. As the vendor, so it is apprehended is the lessor bound to disclose similar defects to the lessee, and on the other hand, it is provided that the lessee is also bound to disclose to the lessor any fact concerning which the lessor is ignorant, and which may increase materially the value of his interest in the property. But while the vendor is bound to disclose the defects in all cases, the lessor transferring as he does his interest in the property temporarily is only bound to disclose only such defects as are material, *with reference to its intended use*. Hence where the lessor does know, the use to which the lessee intends to put the demised property, he cannot be held liable for non-disclosure. And so in England it has been held that while the lessor of a furnished house is presumed to promise that it is fit for occupation,¹ the lessor of an unfurnished house is under no similar liability.² The position of the lessor in this respect is similar to that of the bailor who too "is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults."³ And similarly it has been provided by sec. 114 that "where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose."⁴ And accordingly it has been held that while it is unreasonable that the seller should be cognizant of all the purposes to which the article he sells might be applied,⁵ still where he sells goods for a specified purpose, he must see that the article sold shall be reasonably fit for use, or shall be merchantable, as the case may

¹ *Smith v. Marrable*, 12 L. J. Exch. 223; followed in *Sutton v. Temple*, 13 M. & W. 62; *Wilson v. Pinck-Hatton*, 2 Ex. D. 236.

² *Keeble v. Earl Cadogan*, 10 C. B., 591.

³ Sec. 150, Indian Contract Act (Act IX of

1872).

⁴ *Ib.*, sec. 114.

⁵ *Drummond v. Faud. Inge*, 12 App. Cas., 234 (298); *Jones v. Padgett*, 24 Q. B. D. 650.

be.¹ So in a case where the plaintiff hired a thatched bungalow of the defendant, entered into possession, and after living in the house some time, lit a fire in the fire-place in one of the rooms, and the chimney took fire, causing destruction of the plaintiff's furniture. The lessee having subsequently ascertained that the chimney had been thatched over, of which fact he had been all along ignorant, it was held that the landlord-defendant was liable in damages for the loss sustained by him.² It would appear that in England the lessee would be entitled to the same relief under similar circumstances. Thus in a case where the tenant's wife was injured by the plaster which fell from the ceiling, the tenant was held entitled to sue for damages.³ But, of course, in such a case the claim for damages may be repelled if it can be shown that the damage was caused to the tenant by his not using the house in a tenable and proper manner,⁴ or that it was diverted to some other use than for which it was originally let, but the fact that the landlord was not himself aware of the defect or that he believed the property let to be sound and suitable for the purpose, has been considered to be no excuse, if in fact the property turns out to be materially defective.⁵

758. In the lease of a mine no covenant is implied on the part of the lessor to allow the lessee to sink a pit or shaft, although various provisions of the lease cannot be carried into effect without his doing so.⁶ In other words, the lessor is not presumed to covenant with the lessee to remove all obstacles in the successful working of the property. He does not by giving him a lease, agree to give him a license with regard to interest other than the subject-matter of the covenant. And in ordinary cases, where the lessee has had an opportunity of inspecting the property for himself, the tendency of English decisions seems to be to disallow pleas founded upon non-disclosure, unless the lessor has been guilty of misrepresentation or wilful suppression.⁷ And where the covenant might and ought to have been made explicit, the Court will not easily listen to implied covenants.⁸ As Sir G. Mellish, L. J., observed :—"The Common law of England is distinguished from the law of almost all other countries by the fact that it does not imply contracts and agreements to anything like the same extent, but generally obliges those who make contracts to insert in those contracts all the stipulations by which they intend to be bound. No doubt there are cases in which obligations may be implied, but as a general

¹ *Jones v. Just*, 3 Q. B., 197 (208).

² *Radhika Krishna v. O'Flaherty*, 3 B. L. R. (A. C.), 277.

³ *Walker and Wife v. Hobbs*, 28 Q. B. D., 458. [Similar provision has been made now by sec. 75 of the Consolidating Housing of the Working Classes Act, 1890, 53 and 54 Vic., Ch., 70.]

⁴ *Yellowby v. Gower*, 11 Exch., 204; *Harnett*

v. Muilland, 26 M. and W., 257.

⁵ *Per Mainstay, J.*, in *Charlsey v. Jones*, 58 J. P., 280.

⁶ *Earl of Glasgow v. Harlet Alum Co.*, 3 H. L. Cas., 25; *Roxbotham v. Wilson*, 8 H. L. Cas., 248.

⁷ *Keates v. Cadogan*, 26 L. J. C. P., 78.

⁸ *Aspin v. Austin*, 5 Q. B., 671.

rule the man who wishes to have a particular stipulation for his benefit must take care to have that stipulation inserted in the contract.¹ There is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises, and there is no implied obligation on his part to keep up the fences of closes which he retains in his own hands, and which abut upon land demised to a tenant, so as to prevent the tenant's cattle from straying on to them.² And so in the absence of any agreement on the subject, a person who agrees to take a house must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for living in.³ Defect in title is a material defect vitiating the contract, and on which the lessee can avoid the lease and sue for damages, it being immaterial whether the defect extends only to a part of the demised premises or to the whole. In such a case the lessee would be entitled to refuse to take possession of such part of the demised premises, and elect to keep the remainder, and he might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counter-claim.⁴ It may be doubted whether defect in the lessor's title can be said to be any material defect in the *property* within the meaning of the clause, but if so, clause (c), and sec. 18 of the Specific Relief Act⁵ distinctly provide in similar terms for such a contingency. Under that section "where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee, has the following rights :⁶—(a) If the vendor or lessor has, subsequent to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest ; (b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence ;"⁷ or he may sue for damages.⁸ And it is also provided that "where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest, and costs on the interest of the vendor or lessor in the property agreed to be sold or let."⁹ Thus then it seems to be clear that where the lessee has discovered defect in the lessor's title before entering into possession of the property, he is clearly entitled to refuse to take possession, and may moreover maintain a suit for damages. But if the lessee enters into possession and then discovers the defect, it is doubtful if he

¹ 3 Ch. App., 756 (763, 764).

² *Erskine v. Adeane*, 3 Ch. App., 756.

³ *Chappel v. Gregory*, 34 Beav., 250.

⁴ *Mostyn v. West Mostyn Coal and Iron Co.*,
1 C. P. D., 145.

⁵ Act I of 1877.

⁶ Except as otherwise provided by Ch. II of the Act.

⁷ Sec. 18, Specific Relief Act (Act I of 1877).

⁸ *Ib.*, sec. 19.

⁹ *Ib.*, sec. 18 (d).

can refuse to continue in possession, specially where he could have maintained a suit for damages on the implied covenant for title.¹

754. (b) To give possession.—The first duty of the lessor upon execution of the lease is to deliver possession of the demised premises to the lessee, unless by the terms of the contract possession is not agreed to be delivered immediately. If the lessor fails to deliver possession, the lessee may maintain a suit in ejectment against him, and if possession was at the time of the lease with a third party, he is equally entitled to oust him on the strength of his lease; but in such a case his claim being under the lessor, he cannot eject the stranger if the latter could not have been ejected by the lessor.² It is not necessary that the lessor should be in possession of the property at the time he leases it.³ But in such a case he runs the risk of having the contract repudiated by the lessee at his option, who cannot be forced to embark upon litigation with a view to recover possession from a stranger, but may sue his lessor as if on a breach of contract.⁴ Hence it has been held that where the demisor of land under a *kanam* agreement is unable to give possession, the demisee may repudiate the contract and recover the amount advanced.⁵ Where the lessee chooses to eject the stranger, it is not necessary for him to make the lessor a co-plaintiff.⁶ But where the lessee chooses to maintain a suit for possession against a third party, and fails, he cannot charge in a subsequent suit on a breach of contract against the lessor for the costs of his unsuccessful litigation. Thus in a case where the lessor expressly promised to make good anything in the shape of *khisara* or *nuksan* (damages) to which the lessee may be put in consequence of his not obtaining possession of the demised premises, Jackson, J., after recapitulating the facts of the case observed: "It is contended, for the respondent, that in making this agreement, the parties had in contemplation such expenditure as the plaintiff claims in the present suit. I cannot see any trace of the parties having had any such thing in their contemplation, and it appears to me improbable that they should. It is not denied that the lessee, when he found that he could not get possession, might have thrown up his lease, and retired from the matter altogether. Upon that principle, therefore, is he entitled, when he had option to say, 'As a matter of advantage to myself, I prefer to litigate the title of my vendor with the party in possession; and, failing in that litigation, I will make my lessors pay my expenses.' It seems to me he has no right whatever. If he entered upon this contest, he did so at his own risk, and having failed, he must take the costs on himself."⁷ Thus

¹ Cf. *ib.*, sec. 35.

² *Acharya v. Hanumantrapada*, 1 L. R., 14 Mad., 209; following *Prankrishna v. Bismambhar*, 2 B. L. R., 207; *Tiercy v. Kristo Mohun*, L. R., 11 A., 76; see also to the same effect *Lokenath v. Jugobundhoo*, 1 L. R., 1 Cal., 297.

³ *Id.*

⁴ *Vayalil Pudia v. Udaya Varma*, 2 M. H. C. R., 315.

⁵ *Id.*

⁶ *Prankrishna v. Bismambhar*, 2 B. L. R. (A. C.), 207.

⁷ *Khaja Mahomed v. Baboo Kishorlal*, 6 B. L. R., App., 14.

then it is apparent that the lessee who chooses to litigate with a stranger does so at his own risk. If he fails, all that he can then claim from the lessor is nominal damages. For if the latter had leased the property *bona fide* believing that he had title, both the lessor and the lessee have been disappointed, for the latter has lost the lease, and the former the rent.¹ But where the lessor has been guilty of misrepresentation or other misconduct, the case of course becomes different. It is apprehended that in a case as above, the better course for the lessee is to sue both the stranger, and the lessor in one suit, the former for possession, and the latter to support his title or to pay compensation for the breach of contract. The stranger whom the lessee sues for possession is entitled to put the latter to the proof of his title.² And a transfer by way of lease which is speculative or contrary to public policy does not give the transferee any right to obtain possession.³ Where the lessee obtains possession of only part of the property leased to him he is entitled to a corresponding abatement of the rent reserved.⁴

755. (c) To secure quiet enjoyment.—The lessor has not only to deliver possession of the leased property, but he is further bound to see that the lessee is not interfered with during the period of his lease, either by him or anyone else. This is in English law known as a covenant for quiet enjoyment. But by this covenant in law for quiet enjoyment “the lessee is to enjoy his lease against the *lawful* entry, eviction or interruption of any man, but not against tortious entries, evictions or interruptions, and the reason of the law is solid and clear, because against tortious acts the lessee has proper remedy against the wrongdoers.”⁵ But in such a case if it appears that the lessor has failed by his remissness to do that which he alone could have done to protect his lessee in possession, even independently of any protective provision in the lease, he cannot claim rent from the lessee in respect of the portion of the property from which the latter has been evicted.⁶ The covenant for quiet enjoyment, from its very nature implies that the lessor has title to grant the lease, and if therefore it turns out, that he was without title and the lessee is consequently evicted, the latter can under the clause maintain an action for damages on the covenant for quiet enjoyment.⁷ And in England it is settled as an inflexible rule that the covenant is co-extensive with the lessor's estate, and when his interest in the estate ends, his *implied* contract for quiet enjoyment ends with it also.⁸ And

¹ *Ib.*, p. 46; *Bullen v. Lalit Jhu*, 3 B. L. R., App., 110.

² *Acharya v. Hanumanbryudu*, I. L. R., 14 Mad., 299 (271).

³ *Kutiba v. Kanhya Lal*, I. L. R., 11 Cal., 121 (133), P. C.

⁴ *Insambudi v. Kamleshwari Pershad*, I. L. R., 21 Cal., 1005, P. C.

⁵ *Platt on Covenants*, 318; *Woodfall, Landlord and Tenant*, 713; *Hays v. Brickerstaff*,

Vaug., 118; *Dowdell v. Girdhari Singh*, 23 W. R., 121; *Vithalinga v. Vithalinga*, I. L. R., 15 Mad., 111 (121) following the above authorities.

⁶ *Wajid Ali v. Mt. Chundrabully Koorce*, 22 W. R., 542.

⁷ *Stranks v. St. John*, L. R., 2 C. P., 376.

⁸ *Woodfall, Landlord and Tenant* (16th Ed.), 719.

it has been recently held that the covenant must be assumed to be restricted to quiet enjoyment by the tenant only so long as it is lawful for him so to enjoy it. Hence where by an act of Legislature he is evicted, he cannot sue the lessor on the covenant, nor can he refuse to pay rent.¹

756. The question whether the condition "that if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee" in the clause constitutes a condition precedent upon the fulfilment of which his right to quiet enjoyment is dependent, is important, since if it is a condition precedent the lessor can insist on its performance and can plead its non-performance in his defence against the lessee, but if it is not, he is bound to secure to the former quiet enjoyment independently of his obligation to pay the rent and perform the contracts binding upon him. In an English case where a provision in the lease was almost similarly worded thus: "The lessees shall be entitled, on giving six months' notice before the expiration of the term, to have a further lease of twenty-one years at a certain rent *upon the lessees* paying the rent and performing and observing the covenants" it was held that looking to the scheme of the whole lease, and particularly to the grammatical construction of the clause, the payment of rent and performance of covenants was a condition precedent which should have been observed before the lessee could claim to obtain a renewal of the lease.² But in an earlier case the covenant for quiet enjoyment and the covenant to pay rent were regarded as independent of each other.³ And so in a Madras case of sale where the vendor continued in possession as tenant of the purchaser, the latter also agreeing that the vendor should have the right to repurchase the property within a fixed time stipulated thus: "If you (the vendor) fail to pay the amount of the sale within the limited time, you shall have no right to the land. You are further required to act right and in conformity with the deed of rent granted by you on this date, and in the event of your failing so to do this agreement shall be null and void;" it was held that there was no natural connection between the lease and the right to repurchase.⁴ There can be no doubt that the language used in these cases was susceptible of the different interpretations contended for, but in the clause the use of the word "if" seems distinctly to make for a condition precedent upon which enjoyment without interruption was regarded as dependent.

757. Where the covenant for quiet enjoyment is inserted in the deed, as it is usually done in England, the question then becomes one of construction and the rights of parties will then be determined

¹ *Mervanji v. Syal Sirdar Ali*, 1 L. R., 28 Bom., 510; see also sec. 50, Indian Contract Act (Act IX of 1872).

² *Bustin v. Bidwell*, 18 Ch. D., 238 (253).

³ *Edge v. Biles*, 16 Q. B. D., 117; follow.

ing Dawson v. Dyer, 5 B. & Ad., 584; see also *Saniterson v. Mayor of Berwick*, 13 Q. B. D., 547.

⁴ *Chidambara v. Manikha*, 1 M.H.C.R., 68.

according to the expressed intention of the covenant, the maxim being

Covenant, qualified and unqualified.

*expressum facit cessare tacitum.*¹ An express covenant may according to the English cases be either qualified or unqualified. A

qualified covenant is often to the following effect:—"And the said lessor doth hereby for himself, his heirs, his executors and administrators, covenant with the said lessee, his executors, administrators, and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from or by the said lessor, his heirs or executors, administrators or assigns, *or any other person or persons claiming by, from or under him, them or any of them.*"² Usually the word "lawful" or "lawfully" is also inserted before "interruption" or "claiming."³ Such covenants afford, however, very limited protection to the lessee, as they exclude both the covenant for title as well as the implied covenant for quiet enjoyment.⁴ "It may be laid down as an almost universal rule," says Woodfall, "that however framed, it may be safely entered into by any lessor who never had any title whatever to the demised premises, or any part thereof; because any subsequent entry, eviction, ejectment or other interruption or disturbance by the real owner, or by the party entitled to possession, or by any other person who does not claim 'by, from or under' the lessor, would be no breach of such qualified covenant, which covenant excludes the implied covenant for title, as well as the implied covenant for quiet enjoyment."⁵ Hence, such a covenant would not protect the lessee from the eviction by the act of the superior landlord of the lessor, and it has been held in the same case that unless the lessee shows the interruption to be by a person *claiming by, through or under him*, he is without a remedy.⁶

758. In an unqualified covenant the words "or by any person or persons whomsoever" are substituted for the words above italicized. In such a case the lessee is entitled to relief against all interruptions and disturbances.⁷

Breach of the covenant.

In order to constitute a breach of a covenant for quiet enjoyment in a lease of land, it is sufficient that the lessee's ordinary and lawful enjoyment of the demised land be substantially interfered with by the acts of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession of the land be otherwise affected. Hence where the lessor let a certain farm to the plaintiff with the usual covenant he having previously let another of such farms adjoining, but lying above the plaintiff's farm, to one C,

¹ "An explicit contract overrides the implied one."

² Conveyancing Act, 8 & 9 Vic., Ch., 124, Sch.

³ Pridgeaux's Precedents (15th Ed.), vol. II, 54, 172.

⁴ Merrill v. Frme, 4 Taunt., 829.

⁵ Woodfall, Landlord and Tenant (16th Ed.), 718.

⁶ Kelly v. Rogers [1893], 1 Q. B., 910; following Stanley v. Hayes, 3 Q. B., 105; Harrison v. Muncaster [1891], 2 Q. B., 680, observed upon.

⁷ Lloyd v. Tomkies, 1 T. L. R., 671.

with a right to use the drains through the plaintiff's land, so far as they were adequate to carry the water from C's farm, and C during the plaintiff's tenancy, first by an excessive user of the drainage system, which was properly constructed for the purpose of the drainage, caused the water passing down the drains in his farm to escape and overflow into the plaintiff's farm and damage his crops, and secondly, by a proper user by C, of the drains passing through the plaintiff's farm, damage was also done to a field in plaintiff's farm by the escape of water, but these arose from one of the drains there having been imperfectly and improperly constructed, it was held that the lessor was liable to the plaintiff for a breach of his covenant for quiet enjoyment in respect of the last damage, as there had been within the meaning of such covenant a substantial interruption by a person who lawfully claimed through him. But that the lessor was not liable for the damage done by the excessive user by C of the drainage system, which was properly constructed, either under his covenant for quiet enjoyment or under the law of trespass or nuisance.¹ "A breach of the covenant for quiet enjoyment may occur either by a molestation arising from an action of any kind relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the premises of the first sort is an ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented: thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, was held broken by a suit for them, although commenced after the expiration of the term:² but where in a covenant for quiet enjoyment the breach assigned was, that the defendant had exhibited a bill in Chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with 20s. costs; it was held on demurrer to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a suit for waste."³ But any annoyance on the part of the lessor interfering with the lessee's right of enjoyment would be a breach of the covenant for quiet enjoyment. Hence where the lessor constructed a gate intercepting the demised close, although he had a perfect right to erect it, or dug a quarry over the demised mines and thus made holes through which water percolated and flushed the mines, the lessee was held entitled to sue the lessor for disturbance in breach of his covenant for quiet enjoyment.⁴ So where the lessor was owner of two adjoining pieces of land, and he built upon one and demised it to the lessee covenanting for quiet enjoyment, and subsequently on the other piece he erected buildings of such a height that they caused the chimnies of the lessee's house to smoke badly, it was held that the lessor was liable for the breach of the covenant for quiet enjoyment.⁵ The mere existence of a nuisance unknown to the lessor and which

¹ *Sanderson v. Mayor of Berwick*, 13 Q. B. D., 547.

Ed.), 725.

² *Laming v. Laming*, Cro. Eliz., 316.

⁴ *Woodfall, Landlord and Tenant* (16th Ed.), 725.

³ *Woodfall, Landlord and Tenant* (16th

⁵ *Tebb v. Cure* [1901], 1 Ch., 542.

could be remedied by the lessee, is, however, not a breach of the covenant upon which the lessee could recover.¹ For in order to support an action founded on the implied covenant, it would appear to be necessary that the disturbance complained of by the lessee must be material and lasting. And it must be noted that the covenant is not a covenant of indemnity and only extends to interruptions which might have been foreseen when the lease was granted. The question whether the lessee's enjoyment has been so far disturbed as to afford him cause to complain is in every case a question of fact which must be decided upon the evidence in each case. But there are certain facts which, when proved, establish the breach in law upon which the lessee can recover. Thus where the lessee is deprived of the enjoyment of rent on account of notices served by the lessor on the sub-tenants calling upon them to cease paying rent to the former and not to the lessee, and threatening the tenants with legal proceedings in default of compliance with the notice. In such a case where in consequence of the notice one of the sub-tenants actually paid rent to the lessor, "it is obvious," says Pollock, B., "what the probable results of such a notice would be. It is impossible, as it seems to me, to hold that, under the circumstances of this case, and having regard to what actually followed, this notice can be treated as no more than a mere false and idle claim or threat of which no notice might be taken. To my mind there is evidence of a substantial disturbance of the plaintiff's quiet enjoyment of the property demised."² If in such a case, however, the notice had not been acted upon, it is certain that the mere giving of a notice not followed by the actual payment of rent would not have been a breach of covenant for quiet enjoyment.³ But where the lessor instigates his former tenants to set up an unfounded claim and thereby ousts the lessee, the former would clearly be liable. So also where in consequence of the lessor's instigation the tenants suspend the payment of rent for which they are liable, the lessor is no better position merely because he has not himself realized the rents.⁴ The question in such cases really is not whether the lessor has in any way benefited by the disturbance, but whether there has been substantial disturbance of the lessee's right to quiet enjoyment and which must be attributed to the lessor's interference.⁵ But the covenant for quiet enjoyment is restricted to allowing the lessee to use the property only for the purpose for which it is let. Thus where the lessor lets a house, which was used as a grocer's shop when let, the lessee is not at liberty to turn it into a beer-house. As was observed by Willes, J.: "The covenant for quiet enjoyment whether with or without a partially restrictive covenant has, therefore, been regarded as a covenant to secure title and possession, and not to guarantee to the tenant

¹ *Hope v. Walter* [1899], 1 Ch., 879.

² *Edge v. Boileau*, 16 Q. B. D., 117.

³ *Whitchot v. Nine, Brown and Gold*, 81; cited in *Edge v. Boileau*, 16 Q. B. D., 117 (120).

⁴ *Morrison v. Chadwick*, 7 C. B., 206, followed in *Vithilinga v. Vithilinga*, 1 L. R., 15 Mad., 111 (121).

⁵ *Sanderson v. Mayor of Berwick-upon-Tweed*, 13 Q. B. D., 547.

that he may lawfully use the land for any purpose not in the restriction. To give it a wider effect might involve some strange consequences. If a seller or lessor had worked out mines, and the purchaser or lessee were to build a house, which sunk into the old workings, here would be a breach at once. In other words a warranty would be read in, that the land was capable of being used for any purpose or for any purpose not expressly excluded."¹ A person having only an *interesse termini* cannot maintain an action on a covenant for quiet enjoyment; neither can he maintain an action for trespass, or for damages.² But an action against the lessor on the covenant would not be had merely because he happens to be a *benamidar*.³ The benefit of the covenant for quiet enjoyment runs with the land and is therefore binding on the assignees of the reversion; and may be rendered available by the assignees of the term. Thus "where *A* let to *B*, who assigned to *C*, and *C* assigned to *D*, and *B* had covenanted for quiet enjoyment with *C*, and his assigns, it was held by the Exchequer Chamber, that *D* might maintain an action against *B*, on being ejected by *A*, for a forfeiture by *B*, before the assignment to *C*."⁴ But the covenant for quiet enjoyment ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted.

Thus in a case where the lessor who was a tenant for life, with remainder over, leased his interest for fifteen years, but died before the expiration of the term, and the lessee was ejected by the remainder man, it was held after examination of the old authorities that the implied contract ceased with the lessor's estate and that, therefore, the lessee could not maintain an action for quiet enjoyment against the executor of the tenant for life.⁵ The rule is not based upon the presumption that the lessee might be supposed to have known the limited nature of the lessor's interests, for whether the lessee does or does not know of the limited interest of the lessor the rule would equally apply.⁶

759. Relief.—In a case on the breach for quiet enjoyment the lessee is entitled to recover damages, the equivalent to the prospective profits of which the lessee has been deprived.⁷ He is also entitled to charge for any structure he may have raised on the land,⁸ and for any expenditure incurred by him in converting the land to the purpose for which it was demised.⁹ On this subject, the general rule of law followed is that laid down in *Robinson v. Harman*¹⁰ "that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be

¹ *Dennett v. Atherton*, 7 Q. B., 316 (326, 327).

² *Wallis v. Hands* [1893], 2 Ch., 75.

³ *Somasundram v. Fischer*, I. L. R., 19 Mad., 60.

⁴ *Campbell v. Lewis*, 3 B. & Ald., 392; 21 R. R., 520; affirming *Lewis v. Campbell*, 8 Taunt., 715; 21 R. R., 618; Woodfall, Landlord and Tenant (16th Ed.), 727.

⁵ *Adams v. Gibney*, 6 Bing., 656; 22 R. R.,

514; *Penfold v. Abbot*, 32 L. J. Q. B., 67.

⁶ *Baynes & Co. v. Lloyd and Sons* [1895], 2 Q. B., 610 (617); *Baynes & Co. v. Lloyd and Sons* [1895], 1 Q. B., 820 (826); *Williams v. Burrell*, 1 C. B., 402.

⁷ *Nagardas v. Ahmedkhan*, I. L. R., 23 Bom., 175.

⁸ *Ralph v. Crouch*, 3 Exch., 44.

⁹ *Bunny v. Hopkinson*, 26 Beav., 565.

¹⁰ 1 Exch., at p. 355.

placed in the same situation with respect to damages as if the contract had been performed." In short, in such cases, the lessee is entitled to recover the value of the lease which he has lost, calculated at the date of the eviction,¹ together with the mesne profits without interest.² And where there has been an eviction of part of the land the mode in which damages are to be assessed will vary according as the failure of title takes place as to an undivided share of the land, or as to an ascertained portion of it. In the former case, the vendor must refund an aliquot part of the purchase-money, according to the fractional part lost by the purchaser. In the latter case, evidence may be given of the quality of the specific piece from which the plaintiff has been ejected, and the law will apportion the damages to the measure of value between the land lost and the land preserved. Where the land is only held on lease, and there is a partial eviction by title paramount, the rent will be apportioned.

The damages then ought, according to the principle laid down before, to be the value of the part evicted for the unexpired portion of the term; that is, the difference between the rent which would have been paid, and the profits which would have been made.³

760. (d) Lessee's right to accessions.—This clause lays down the same principle as is enunciated in secs. 63 and 70. Its provisions also correspond with those made in the various Local Acts.⁴ Even prior to the passing of the Act the lessee was entitled to the benefit of the accessions made to the property. Thus in *Goorodas Roy v. Isur Chunder Bose*⁵ it was observed—"We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law, and it is a rule supported by reason and principle." So also in another case it was ruled that as between the ryot and the zemindar, if the tenant can show that the land in dispute is an accretion to his original holding, he is entitled to succeed. And it was further held in the same case that the fact that the lessee is no more than a tenant-at-will will not entitle the zemindar to dissociate the accretion from the original grant and to turn the tenant out of the accretion, while he still retains, as tenant, the original holding itself.⁶ The rule is the same whether the accession is natural or made at the expense of the lessee. Hence where the tenant plants trees upon the demised land, they cannot be regarded as something distinct from and independent

¹ *Nagaldas v. Ahmedkhan*, I. L. R., 21 Bom., 175 (188).

² *Mayne on Damages* (4th Ed.), 196, 199.

³ *Mayne on Damages* (4th Ed.), 202, 203.

⁴ See Bombay Act V of 1879; Bengal Regulation XI of 1825, sec. 4; N.-W. P., Act XI

of 1881; Oudh Act V of 1879.

⁵ 22 W. R., 246.

⁶ *Bhagabat v. Durg Bijai*, 8 B. L. R., 78 (77); distinguishing *Lopez v. Muddan Thakoor*, 5 B. L. R., 521, P. C.; followed in *Gourhari v. Bhola*, I. L. R., 21 Cal., 233, F. B.

of the tenant-right by which he holds the land. No doubt where the accession can be severed without causing injury to the principal, the lessee has a right of removing it during the term of the tenancy, but he cannot do so afterwards, since upon the determination of the tenancy the accession with the soil passes to the lessor. If, therefore, he attempts to remove the accession after the termination of his tenancy, he would then be deemed a trespasser.¹ And so it has been held by a Full Bench of the Calcutta High Court that a ryot who has an occupancy-right in a *jote* is entitled to hold the accreted land as an increment to that *jote*.² All increments made by the lessee upon land adjoining to, or even in the neighbourhood of, his holding are presumed to have been made for the benefit of the landlord, and if he has acquired a title against a third person by adverse possession, he has acquired it for his landlord and not for himself.³ The tenant cannot acquire a title as to his accessions adversely to his landlord. And similarly the landlord cannot claim to hold and enjoy separately the accessions made to the property demised to the lessee (unless it be by an encroachment upon the lessor's other land, in which case the lessee is in no better position than a trespasser, and may be ejected⁴), but may claim a fair and reasonable rent "on the ground that the tenant pays less than his neighbours, or that the productive power of the land has increased, or that the quantity of the land held by the tenant is greater than that for which rent has been previously paid by him."⁵ But the landlord cannot obtain back rent or compensation for use and occupation for the accreted area, nor is he entitled to treat it as a separate tenure altogether, for the purpose of obtaining additional rent, which must be fixed after investigation into the value of the increment due to the accretion and to ascertain which oral evidence may be given.⁶ The clause has no application to encroachments committed by the tenant on his landlord's land *without his consent*. Accordingly it has been held that a lessee making encroachments upon the land of his lessor is not against the will of the landlord to be treated as a tenant. As Garth, C. J., observed: "It would indeed seem strange if, as a matter of law, a tenant were allowed, without his landlord's permission, to appropriate any land which adjoins his own tenure, and then when his landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it until the expiration of his tenure."⁷ And so in a later case

¹ *Ram Baran v. Salig Ram*, I. L. R., 2 All., 896.

² *Gourhari v. Bhola*, I. L. R., 31 Cal., 233 (235), F. B., following *Gobind Monce v. Denobundho*, 15 W. R., 87; *Attimollah v. Sahebollah*, 4b., 149; *Bhagabat Prasad v. Durg Bijai*, 8 B. L. R., 73.

³ *Nandiyarchand v. Meqjan*, I. L. R., 10 Cal., 620.

⁴ *Prohlad Teor v. Kedar Nath*, I. L. R.,

25 Cal., 302.

⁵ *Gooro Das v. Issur Chunder*, 22 W. R., 240 (247); see to the same effect *Ramnidhee v. Parbutty*, I. L. R., 5 Cal., 323; *Brojindra v. Wopendra*, I. L. R., 8 Cal., 700.

⁶ *Assanullah v. Mohini Mohan*, I. L. R., 26 Cal., 739 (745).

⁷ *Nuddpar Chand v. Meqjan*, I. L. R., 10 Cal., 820.

Macleay, C. J., remarked: "It strikes me as an odd result that a tenant of plots *A* and *B* can by encroaching on plot *C* which also belongs to his landlord successfully claim by that action on his part to be entitled as between himself and his landlord to be treated by the latter as the tenant of the plot *C*; in other words by his own wrongful act to force himself upon his landlord *nolens volens* as tenant of plot *C*."¹ The law on the subject is the same in England² where the rule was stated to be based upon the obligation of the tenant to protect his landlord's rights, and to deliver up the subject of his tenancy in the same condition, fair, wear and tear excepted, as that in which he enjoyed it.³ "There is," says Willes, J., "often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord's, and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments, should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively. The result is to avoid questions which would otherwise frequently arise as to the property in land, and to exclude persons who have come in as tenants, and who are likely to encroach from raising such questions. The reason of the rule appears on the one hand to be entirely independent of any notion of encroachment being a wrong done, and so also on the other hand it appears to be quite independent of the question, whether the encroachment was made with the assent of the landlord. It might be otherwise if the rule applied only to land belonging to the landlord, because in that case the assent of the landlord might be taken to create some new relation; but when it is considered that the rule is a general one, it does not appear that the fact of assent has any distinct bearing on its operation . . . The case of an encroachment is a peculiar case in the law, which treats it as being part of the holding. It follows obviously that the general provisions of the statute of limitation do not apply to it."⁴ Of course in such a case limitation against the lessor will begin to run upon determination of the lease.⁵ The law so stated would no doubt equally apply to this country except where the lessee has encroached upon the land of his lessor, in which case, the mere fact of his holding some other holding would not prevent his being rejected as a trespasser unless of course it can be shown that the landlord is estopped, as where it has been acquiesced in by him.⁶ Thus for example, where, as it often happens, the lessor stipulates in the lease that the accession shall be enjoyed either by himself or by the lessee in a particular manner, the rule has no application.

¹ *Prohlad Teor v. Kedar Nath*, I. L. R., 25 Cal., 802.

⁴ *Ib.*, pp. 7, 8.

⁵ *Ib.*, p. 8.

² *Earl of Lisburne v. Davies*, 1 O. P., 259; *Whitmore v. Humphries*, 7 C. P., 1 (5).

⁶ *Nudiyar Chand v. Menjan*, I. L. R., 10 Cal., 820; *Prohlad Teor v. Kedar Nath*, I. L. R., 25 Cal., 802.

³ *Whitmore v. Humphries*, 7 C. P., 1 (5).

761. (e) Lessee's right to avoid the lease when property destroyed, &c.—While the lessee is then entitled to the accession the next clause declares that he is not liable to continue the lease if the property demised to him is destroyed or materially deteriorated. And in this respect the law in this country deviates from the corresponding rule in England where unless it is expressly stipulated otherwise, the liability of the lessee to pay rent does not cease with the destruction or deterioration of the demised property.¹ But in England, it is the practice of conveyancers to insert a proviso in the lease that the rent shall be suspended or extinguished in the case of destruction or damage of the demised property "by fire, flood, storm, tempest, or other inevitable accident."² And the English rule seems to have been followed in this country prior to the passing of the Act. Thus in a case where a parcel of land with a warehouse standing thereon was leased to the mortgagee, and the warehouse was subsequently destroyed by fire, whereupon the mortgagee ceased to pay rent to the mortgagor, it was held that the loss of the premises which had arisen from accidental causes could not affect the mortgagor's right to recover the rent due to him.³ But in one case it was remarked that "if a man stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of the land rented. According to English law a tenant is entitled to abatement in proportion to the quantity of land wasted away, and he is entitled to that abatement in suit brought by the landlord for arrears of rent."⁴ And so in another case it was held that "upon principles of natural justice and equity, that if a landlord lets his land at a certain rent, to be paid during the period of occupation, and the land is, by act of God, put in such a state, that the tenant cannot enjoy it, the tenant is entitled to an abatement."⁵

Thus, then, it would appear that the course of decisions prior to the passing of the Act was by no means uniform. The clause as it stands is now clear as regards the non-liability of the lessee when the property leased is destroyed, or substantially and permanently rendered unfit for the purpose for which it was let. But the destruction or deterioration must be due to natural causes, such as fire, tempest or flood, or violence of an army or of a mob, or other irresistible force such as an earthquake or other similar causes. In all the cases the lessee is entitled to avoid the lease, provided that he has not himself been guilty "of wrongful act or default" in consequence of which the injury has been occasioned. The principle of this section has been applied to the lease of coffee plants which having been destroyed by fire, the lessee was held not liable to pay the rent assessed thereon.⁶ Similarly in a Bombay case, where the defendant leased certain godowns to the plaintiff for storing in cotton, on payment of one year's rent in advance,

¹ Woodfall, Landlord and Tenant (16th Ed.), 487.

² *Ib.*, 489; *Baner v. Bilton*, 7 Ch. D., 815.

³ *Venkateswara v. Kesavashetti*, I. L. R., 2 Mad., 187.

⁴ *Afsurooddeen v. Mt. Shorashi*, Marah., 358.

⁵ *Sheik Enayetulla v. Sheik Elaher Buksh*, W. R. (Sp.), 42.

⁶ *Kunhayan v. Mayan*, I. L. R., 17 Mad., 86.

and the roof of the godowns was subsequently destroyed by fire, it was held that the plaintiff-lessee was entitled to avoid the lease and to claim a refund of a proportionate part of the rent paid in advance upon which even interest at 6 per cent. was decreed. In this case it was held that upon destruction of the demised premises the lessee was not bound to wait for the repairs of the building, nor was he bound to accept a makeshift arrangement as a temporary substitute or indeed any other substitute for his lease.¹ But since in all such cases the lease is not absolutely void but only voidable at the option of the lessee, it follows that it is not *ipso facto* determined upon the destruction of the subject-matter, but that the lessee, if he so chooses, may determine it after giving notice to the lessor from which date alone he is entitled to annul the contract.²

762. Eviction.—The clause, it must be noted, is somewhat limited in its application, for it does not take into account cases in which the lessee might be evicted from the demised premises. And it appears that nowhere else in the Act is any provision made as to the lessee's rights in the case of his eviction. On this point authorities, both in England and this country, seem to be unanimous in holding that where the lessee is evicted from the demised premises, he is no longer liable to pay interest in respect of the property of which he has been deprived, and if he has been evicted from only a portion of the land, the rent is in certain cases to be diminished in proportion to the land 'evicted.' As to what constitutes eviction in law is perhaps a question by no means easy of solution. "It is extremely difficult," says Jervis, C. J., "at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved and put out. The word 'eviction' — from *evincere* to evict, to dispossess by a judicial course— was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention."³ Hence then it may be generally stated that where the act of a landlord is not a mere trespass, but

¹ *Dhuramsey v. Ahmedbhai*, I. L. R., 23 Bom., 15; sec. 65, Indian Contract Act (Act IX of 1872).

² *Ib.*, p. 19.

³ *Gopanund v. Lalla Gobind Prasad*, 12 W. R., 109; *Kadymbini v. Kashenauth*, 13 W. R., 338; *Kristo Soondur v. Chunder Nath*, 15 W. R., 230; *Dhunput Singh v. Mahomed Kasim*, I.

something of a graver character, interfering substantially with the enjoyment, by the tenant, of the demised property, the tenant is entitled to a suspension of rent during such interference, even though there may not be actual eviction, and that if such interference be committed in respect of even of a portion of the property, there should be no apportionment of rent, the whole rent being equally chargeable upon every part of the land demised. But if the interference is in respect of only a certain portion of the demised property, the rent for which is separately assessed, there should be apportionment.¹ The policy of the rule which favours the non-payment of the entire rent in the event of partial eviction is stated in an English treatise to be "that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the law he ought to protect and defend."² Lord Denman, C. J., has, however, based the rule upon a different principle.³ He says: "In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small as far as the principle is concerned) has taken no interest, and had no enjoyment and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable either in respect to the whole rent reserved or any portion of it."⁴

Possibly both the reasons have combined to give rise to the rule. "But if the lessor," says Gilbert, "takes a lease of part of the land, or enters wrongfully into part, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such lease or tortious entry. Some have held that there shall be no apportionment in either case, but that the whole should be suspended; for this reason, I suppose, because by the demise, every part of the land was equally chargeable with the whole rent; and therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This, indeed, may be a good reason why the whole rent service shall be suspended if the lord or lessor disseises or ousts his tenant or lessee of any part of the land; because this is a wrongful act to which the tenant consented not, and, if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract; and so by taking that which lies most commodious for the tenant, render the remainder in effect useless or put him to expense and trouble to restore himself to such part by course of law. Therefore, to prevent these inconveniences, and that no man might be encouraged to injure or

L. R., 24 Cal., 296. As to English cases see *Neale v. Mackenzie*, 1 M. and W., 747 (768); *Upton v. Townsend*, 17 C. B., 80 (64); Gilbert on Rents, 178.

¹ *Upton v. Townsend*, 17 C. B., 80 (64).

² *Dhannput Singh v. Mahomed Kazim*, 1 L. R., 24 Cal., 296 (304).

³ Bacon's Abridgment, Tit. Rent.

⁴ *Neale v. Mackenzie*, 1 M. & W., 747 (768).

disturb his tenant in his possession, when, by the policy of the feudal law, he ought to protect him and defend him, these resolutions have been, and so the law is at this day, that such disseisin or tortious entry suspends the whole rent, and the lessee or tenant is discharged from the payment of any part of it till he be restored to the whole possession."¹ But where the land demised at a fixed rent is found on enquiry to be less than that specified to be in the *pattā*, and it is shown that the lessor had no title to lease the whole, the lessee can claim a corresponding abatement of the rent reserved. In such a case, however, the lessee is entitled to claim abatement, not because there has been eviction, but because he fails to obtain what he had bargained for.² But here also the tenant has the option of giving up possession,³ and if he does not, he is only liable to pay rent on the residue upon a *quantum meruit*.⁴ If a portion of land be acquired by the Government for public purposes, the Government being "an irresistible force" or *vis major* within the meaning of the clause, the tenant is also entitled to a corresponding abatement of rent.⁵ Land taken up for railway purposes also falls into the same category.⁶

768. (f) Right to repairs.—In England the lessor is ordinarily not bound to make any repairs to the property.⁷ And although this clause is silent as to the liability of the lessor to repair the demised premises, it would appear that in the absence of local custom, or any stipulation to the contrary, the rule would be the same in this country. In England it has even been held that there is nothing in law to prevent the landlord from letting a dilapidated house to the tenant⁸ and that where the demised premises become in a dangerous state for want of substantial repairs, and the landlord has notice of it, there is no implied obligation on his part to repair them.⁹ And hence it follows that if any injury is caused to a third person by the property being in a dangerous condition from non-repair, the lessee and not the lessor is liable. And it is the same if the party injured is the lessee and not a stranger.¹⁰ No doubt the lessor would in such a case be liable if he has (1) expressly contracted with the tenant to repair, or (2) where he has let the premises initially in a dangerous or ruinous state, or (3) when he has expressly licensed the lessee to do acts amounting to a nuisance,¹¹ or (4) where the

¹ Gilbert on Rents, p. 178; cited with approval in *Dhunpat Singh v. Mahomed Kazim*, I. L. R., 24 Cal., 296.

² *Imambandi v. Kamleshwari*, I. L. R., 21 Cal., 1005 (1016), P. C.

³ *Smith v. Raleigh*, 3 Camp., 513, 14 B. R., 829.

⁴ *Stokes v. Cooper*, cited in note to *Smith v. Raleigh*, 14 B. R., 829; but see *Newton v. Allin*, 1 Q. B., 518, also therein cited.

⁵ *Uma Sankar v. Tarini Chunder*, I. L. R., 9 Cal., 571; but see *Mewanji v. Syed Sirdar*

Ali, I. L. R., 23 Bom., 510; following *Newby v. Sharpe*, 8 Ch. D., 39.

⁶ *Watson & Co. v. Nistarini*, I. L. R., 10 Cal., 544.

⁷ Woodfall, Landlord and Tenant (16th Ed.), 638.

⁸ *Lane v. Cox* [1897], 1 Q. B., 415.

⁹ *Id.*, 638; *Gott v. Gandy*, 2 E. & B., 845.

¹⁰ *Lane v. Cox* [1897], 1 Q. B., 415.

¹¹ Woodfall, Landlord and Tenant (16th Ed.), 778; *White v. Jameson*, 18 Eq., 303; *Chauniler v. Robinson*, 4 Ex. Ch., 163.

act causing a nuisance is expressly contemplated in and authorized by the lease.¹ The repair which the lessee is bound to carry out is only substantial repair, if necessary. "It is a monstrous thing to say that because a person put nails into the walls of a house he must take them out and fill up the holes, or commit a breach of the covenant of a repairing lease."² Where the lessor is bound to repair, the lessee must give him notice, and if within a reasonable time after notice, the lessor fails to make it, the lessee is then empowered to make the same himself, recovering the expense of such repairs with interest from the rent which means the whole rent then due, but not the future rent,³ or otherwise, as for example, by a suit instituted under sec. 69 of the Indian Contract Act. From this it follows, that the lessee cannot throw up the lease merely because the demised property has not been repaired by the lessor. The word "repair" must be reasonably construed, and does not necessarily include the renovation or reconstruction of the leased premises. No doubt in some cases it seems to have been held that where the lessee *covenants to repair*, he may be held liable therefor even to the extent of rebuilding the premises if destroyed by fire.⁴ But later cases do not appear to go so far, and it appears to be now settled that the lessee is not to be supposed to covenant for rebuilding where he has expressly agreed only to repair.⁵ Where the lessor *covenants to repair*, the covenant implies a license by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs. And although for this period the lessee may have been deprived of the use of the property, he cannot on that account claim an abatement of rent.⁶

764. (g) Lessee's right to recover necessary payments.—Under clause (g) the lessee is empowered to make payments for which the lessor is primarily liable and which he may recover with interest out of the rent or from the lessor.⁷ The provisions of this clause are in this respect similar to those of sec. 72 (b) under which a mortgagee in possession is entitled to expend money for preserving the mortgaged property from destruction forfeiture or sale, and for which he is to be similarly reimbursed by the mortgagor. (§§ 502, 503.) Similarly, in England, "where a landlord is liable to any rate or tax, which the tenant has paid, under actual or implied compulsion, the latter may deduct the amount from his rent, unless there is an express covenant or stipulation to the contrary."⁸ The amount which the lessee is entitled to recover is that paid on account of the lessor which the latter was bound to pay. He cannot recover from him if the

¹ *White v. Jamason*, 18 Eq., 308.

² *Perry v. Cholmer*, 9 T. L. R., 488.

³ *Andrew v. Hancock*, 1 B. & B., 37; 21 R. R., 560.

⁴ *Monks v. Cooper*, 2 Stra., 763; *Balfour v. Weston*, 1 L. R., 810; 1 R. R., 210.

⁵ *Packer v. Gibbons*, 1 Q. R., 421.

⁶ *Saner v. Bilton*, 7 Ch. D., 816 (824).

⁷ *Payne v. Burridge*, 13 M. & W. 727; *Sweet v. Seager*, 2 C. B. (N. S.), 119; *Hurst v. Hurst & Exoh.*, 571.

⁸ *Woodfall, Landlord and Tenant* (16th Ed.), 504.

payment be voluntary, or in excess of the legal demand, in the latter case he being entitled to recover no more than the amount of the legal demand. And similarly in England where the landlord is liable to pay the land-tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may have actually paid more.¹

The payments to which the lessor is ordinarily liable are the land-tax and cesses, ground rent and other cognate dues. The lessee who pays them has, according to the clause, two ways of recovery open to him. He may deduct the expense so incurred from the rent, or he may recover it by a separate suit. If he elects to deduct it from the rent, it does not appear that he is entitled to deduct it from future rent. In England it has been distinctly ruled that the deduction should be made from the rent of the current year; and the tenant cannot claim it from his landlord at any subsequent period.² He may, however, appropriate to payment to himself the whole rent which may have accrued and has remained unpaid. And in a suit by the lessor for rent he may claim the same amount by way of set off.³ But if he chooses to pay the rent and recover his claim by suit, it would appear that he must pay it *under protest*,⁴ and if he pays it without demur, he cannot afterwards maintain an action for recovery.⁵ There seems to be nothing against the tenants deducting the expense from the rent so far as it will go, and recovering the balance by suit. The lessee who makes the necessary payments by the lessor is "interested" within the meaning of sec. 69 of the Indian Contract Act, and his claim can, therefore, be made good under that section. Indeed the illustration appended thereto is a good illustration of the case contemplated by the clause. It runs thus:—"B holds land in Bengal, on a lease granted by A, the zemindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease, B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid."⁶ Accordingly, following the principle of this section it has been held by the Calcutta High Court that a *putnidar* who makes certain payments on account of Government revenue due by his superior landlords who have defaulted, although a separate account has been opened for the payment of such Government revenue, is entitled to recover them from the landlords.⁷

Comparing this clause with the last preceding one, it will be observed that, before making payments for the lessor, the lessee is not bound to give him any notice, as he is bound to do in the case

¹ *Whitfield v. Brandwood*, 2 Stark., 440; 20 R. R., 712.

² *Andrew v. Hancock*, 1 B. & B., 37; 21 R. R., 569.

³ *Tinkler v. Prentice*, 4 Taunt., 549; 18 R. R., 684.

⁴ *Baker v. Greenhill*, 3 Q. B., 148.

⁵ *Woodfall, Landlord and Tenant* (16th Ed.), 696.

⁶ Sec. 69, Illus.; Indian Contract Act (Act IX of 1872).

⁷ *Smith v. Dinonath*, I.L.R., 12 Cal., 2 (18).

of repair. The difference in the two clauses is probably due to the more urgent nature of the public demand, which must be met and in which the amount being fixed and certain, the lessor cannot complain that if he had been given a chance, he might have discharged his obligation more economically.

765. (h) Lessee's right to detach erections, &c.—The provisions of this clause empowering the lessee to remove "all things which he has attached to the earth" are in opposition to the maxim "*quicquid plantatur solo, solo cedit*"—that all things attached to the earth become part of it.¹ The term "attached to the earth" is defined in sec. 3, and therefore all things which come within the purview of that definition may be removed by the tenant. Thus, for example, trees, shrubs, emblements away-going crops, warehouses and buildings on other fixtures planted or erected by the tenant may be removed by him, but they must be removed before the determination of his tenancy, after which he cannot be allowed to remove them.² In England the lessee would at no time be entitled to remove these, which would there be usually treated as permanent fixtures.

"Thus," says Woodfall, "the general rule of law with respect to annexations made by a tenant during the continuance of his term, has been established from a very remote period.³ It is, that whenever the tenant has affixed anything to the demised premises during the term, he cannot again sever it, without the consent of his landlord. The property, by being annexed to the land, immediately belongs to the freeholder; the tenant, by making it part of the freehold, is considered to abandon all future right to it so that it would be waste in him to remove it afterwards. It, therefore, falls in with his term, and comes to the reversioner as part of the land."⁴ But it may be here mentioned that this rule was never followed in India even before the passing of the Act. Thus in a

¹ Even in England the maxim has now in practice a somewhat limited application. "The old rule" upon this subject, observes Martin, B. (10 Exch., 507, 588) "laid down in the old books is, that if the tenant or the occupier of a house or land annex anything to the freehold, neither he nor his representatives can afterwards take it away, the maxim being *quicquid plantatur solo solo cedit*. But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purpose of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee-simple by the mere act of annexation became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of Law and

Equity, in the temporary owner or occupier of real property or his representative, to disannex and remove certain articles though annexed by him to the freehold and those articles, have been denominated *fixtures*." But it may be now noted that the definition of the term "*fixtures*" as here given is by no means universally accepted, the term being in English law used indiscriminately in reference to those articles which are not by law removable when once attached to the freehold as well as to those which are severable therefrom. *Per* Parke, B., *Winshall v. Lloyd*, 2 M. & W., 489; *Per* Lord Cranworth, C., in *Ex parte Barriay*, 5 De G. M. and G., 410.

² *Ram Baran v. Saligram*, I. L. R., 2 All., 896.

³ See Year Book, 17 E. 2, p. 518; *Hurtaken-den's case*, 4 Co., 64.

⁴ Woodfall, *Landlord and Tenant* (16th Ed.), 666.

Full Bench case decided as far back as 1866, it was laid down that, "according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their being attached to the soil, become the property of the owner of the soil. The general rule is that, if he who makes the improvements is not a mere trespasser, but is in possession under any *bond fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building, if it was allowed to remain for the benefit of the owners of the soil; the option of taking the building, or allowing the removal of the materials remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate which he may possess."¹ And this rule is, it may be stated, at least as old in India as the corresponding contrary rule in England. Thus Narada says that, "he who dwells in a house which he built on the ground of another man, and for which he pays rent, shall take with him, when he leaves it, the thatch, the wood and the bricks. But if he live without paying rent, on the ground of another without the owner's assent, he shall by no means, when he quits it, take away the thatch and the timber."² The ancient Moham-medan law similarly enacted the same rule: "If a person hire unoccupied land for the purpose of building or planting, upon the term of the lease expiring, it is incumbent on the lessee to remove the buildings or trees, and to restore the land to the lessor in such a state as may leave him no claim upon it."³ So also according to the Civil law, if a person, building on the land of another, used his own materials not knowing that the land was not his own when the building was destroyed, he could reclaim the materials, or if he was in possession of the building, could refuse to deliver it to the owner, unless he was indemnified for his expenses; at least so far as they had been incurred profitably to owner of the soil.⁴ The principle of the maxim *quic quid plantatur solo solo cedit*, has then no sanction in either the text or case law of this country. There are some old cases⁵ in which it was expressly departed from, and it is sufficient to say that the rule now sanctioned, by the Legislature, has been uniformly followed in this country both on account of its being consistent with the sacred texts,⁶ as with justice equity and good conscience.⁷

¹ *In re Thakoor Chunder Puramanick*, B. L. R. (Supp. vol.) 595, F. B.; followed in *Russick Lall v. Lake Nath*, I. L. R., 5 Cal., 688; *Juggut Mohinee v. Dwarka Nath*, I. L. R., 8 Cal., 582 (where the rule held applicable to the mofussil, but not to Calcutta); *Dunialal v. Gopi Nath*, I. L. R., 22 Cal., 820, where the last case was not followed.

² *Colebrook's Digest*, Bk. 3, Ch. 2, § 99.

³ *Hidayah*, Hamilton's Translation, Vol. III, p. 325.

⁴ *Justinian's Institutes* (Sander's Ed.)

Bk. 2, tit. 1, § 30.

⁵ *Khoderam v. Trilochun*, Sel. Rep., 35; *Jankee Singh v. Bukhooree Singh*, 8 D. A. R. for 1858, 761; *Nicom Pogose v. Nyamutoillah*, S. D. A. R. for 1858, 1517; *Kalepershad v. Gourcepershad*, 5 W. R., 108.

⁶ *Russicklall v. Lokenath*, I. L. R., 5 Cal., 488 (per Wilson, J., rule followed, as consistent with Hindu law).

⁷ *Shibdas v. Bamandas*, 8 B. L. R., 257; *Juggut Mohinee v. Dwarka Nath*, I. L. R., 8 Cal., 582 (per Pontifex, J., rule followed

The rule it should be noted is entirely distinct from that enacted in sec. 51, the operation of which is confined to improvements made only by the transferee who believes in good faith that he is *absolutely* entitled thereto.

766. Formerly, in cases decided before the Act, the lessee was held to be entitled to either the removal of his fixtures, or to compensation the latter being usually awarded at the instances of the outgoing tenant in cases where the removal of materials would have materially prejudiced him.¹ Under the terms of the clause, however, the tenant is no longer entitled to the alternative relief.² He must remove or forego the materials which he is entitled to, unless he can establish a case of estoppel against the landlord, by shewing that the latter had "created or encouraged any hope or expectation" in his mind by his words or conduct.³ And for the purpose of creating estoppel against the landlord, mere quiescence or acquiescence is not enough, for it has been held that a man cannot be precluded from asserting his own rights by acquiescence in acts of other parties inconsistent with them unless (1) he has actual knowledge as distinguished from the means of knowledge of his rights;⁴ (2) he has knowledge that the person acting inconsistently with them are doing so under the mistaken belief that they are exercising rights of their own; (3) he has encouraged the parties so acting to spend money or to do other acts either directly or by abstaining from asserting his legal rights.⁵ Such a presumption may, however, well arise in a case where the landlord had not objected to buildings erected by his tenant for a period of twenty-five years, and had during that time received rent from him,⁶ or as Sir Barnes Peacock observed in another case that if the plaintiff allowed the defendants to erect *pukka* buildings upon the land without objecting; it appeared to him that he was bound in the same way, in equity, as if he had granted them a *potta* with the privilege of building *pukka* houses on the land.⁷ So in a case where the tenant had erected masonry buildings within the town of Calcutta, on land which was now acquired by the municipality by paying compensation which both the landlord and the tenants claimed, the former on the ground that the latter's lease was of a

not as a rule of Hindu law, but, as one of equity and good conscience); *Narayan v. Bholagiri*, 6 B. H. C. R. (A. C.), 80 (in which a stranger was equitably allowed to remove his materials), followed in *Premji v. Haji Cassum*, I. L. R., 20 Bom., 298; *Mahalatchmi v. Palani Chetti*, 6 M. H. C. R., 245 (in which existence of the rule was conceded).

¹ *Mahalatchmi v. Palani Chetti*, 6 M. H. C. R., 245.

² *Shah Hussain v. Gorardhandas*, I. L. R., 20 Bom., 1 (6).

³ *Ib.*, p. 7.

⁴ *La Banque Jacques-Cartier v. D'Espargne*, 18 App. Cas., 111 (118); *Willmott v. Barber*,

15 Ch. D., 96.

⁵ *Jugmohan Das v. Pallonjee*, I. L. R., 22 Bom., 1, and see the cases therein reviewed; *Nannihal v. Rameshar*, I. L. R., 16 All., 323, following *Ramsden v. Dyson*, 1 H. L., 129; *Willmott v. Barber*, 15 Ch. D., 96.

⁶ *Yashoda Bai v. Ramchandra*, I. L. R., 18 Bom., 66 and (81).

⁷ *Beni Madhab v. Jai Krishna*, 7 B. L. R., 153; followed in *Lalla Gopi Chand v. Lialul Hossein*, 25 W. R., 211; see also to the same effect *Prosenno Coomaz v. Jagun Nath*, 10 C. L. R., 25; *Gungadhur v. Ayimuddin*, I. L. R., 8 Cal., 960; *Yashoda Bai v. Ramchandra*, I. L. R., 18 Bom., 66.

temporary character, and the latter on the strength of their possession for many years, it was held that the tenants having erected masonry buildings, in one case forty years ago, and in the other twenty-five years ago with the knowledge and permission of the landlord, the tenants and not the landlord were entitled to the compensation.¹

767. (1) Lessee's Right to emblements.—The lessee's right to emblements² may be compared to the similar rights of a transferee under defective title given by the last paragraph of sec. 51. Such a right in the case of a lessee, however, would arise only where (1) the lease is of *uncertain* duration; and (2) it is determined by any means except the fault of the lessee. The rule contained in the clause is borrowed from the English law where the right to emblements is given by law in certain cases to the tenant of an estate of uncertain duration, which has unexpectedly determined, without any fault of such tenant, to take the crops growing upon the land when his estate determines, although the estate itself has ceased.³ Since the passing of the Landlord and Tenant Act, 1851,⁴ however, the right of continued possession until the expiration of the current year of the tenancy has been in England substituted for the right to emblements.⁵ But the section applies only to tenants at rack-rent, and therefore there may still arise cases in which the right to emblements would be the only relief afforded to the outgoing tenant. Barring then the tenants who come within the scope of sec. 1 of the Landlord and Tenant Act, 1851, all other lessees would in England be governed by the rule enacted in the clause.

As stated above before a tenant can claim a right to emblements two conditions must concur. Firstly, his lease must be of an uncertain duration, which means that the lease should be determined at a time which the lessee cannot foresee, as for example under sec. 111, cls. (b), (c) or (h). A tenancy for life whether for the life of the lessee or *pur autre vie*,⁶ and a sub-tenancy thereunder are estates of uncertain duration. A tenant-at-will is also of course within the rule, and it has been held in England that tenants under execution where the tenancy is determined by the judgment being satisfied have an uncertain estate or interest in land.⁷ Tenants whose estate is determined either by the act of God or of the law, between the period of sowing and the severance of the crop are also entitled to emblements.⁸ But a mortgagor retaining possession of the mortgaged property after

¹ *Dunialal v. Gopi Nath*, I. L. R., 22 Cal., 390.

² The term "emblements" is derived from the French *embarance de bled* meaning corn sprung or put above ground, and strictly signifies the growing crops of sown land.

³ Woodfall, Landlord and Tenant (16th

Ed.), 790; Smith L. C. (2nd ed.), 330.

⁴ 14 & 15 Vic., Ch. 25.

⁵ Sec. 1. (14 & 15 Vic., Ch. 25.)

⁶ Co. Litt., 555.

⁷ Woodfall, Landlord and Tenant (16th Ed.), 791.

⁸ Smith's Landlord and Tenant (2nd Ed.), 339.

the time fixed for payment has no right to emblements. Thus, in a case where the mortgagor had sub-let his lands on the condition of receiving a moiety of the crops and the lands so let were sold in execution of a mortgage-decree passed against him, it was held that the purchaser had obtained all right, title and interest of the mortgagor including his right to the moiety of the crops in the hands of his tenants, which the mortgagor could not claim, and nor could his creditors attach them.¹ A mortgagee is similarly not entitled to emblements.² Hence where a mortgagee in possession sued on his mortgage and having obtained a decree brought the land to sale in execution; and the execution-purchaser was placed in possession, the mortgagee was held not entitled to recover from the execution-purchaser the value of the then standing crops.³

Secondly, there can be no right to emblements, where the lease is determined by the fault of the lessee or his legal representatives. Thus where the lease is terminated by breach of condition⁴ or forfeiture for waste committed,⁵ or by marriage of a female tenant who has held her husband's estate during widowhood,⁶ there can be no right to emblements.

768. In England the term "emblements" includes besides the cereals or growing crops of sown lands, also the roots planted and other annual artificial profits.⁷ "The growing crops of those vegetable productions of the soil which are *annually produced by the labour of the cultivator* are emblements."⁸ Fruit trees, therefore, or oak, elm, ash or other trees, cannot be comprehended under emblements; but there may be a right to take emblements in tea-sets."⁹

769. The right to emblements may be assigned and will enure for the benefit of the personal representatives of the deceased lessee. For the purpose of enjoying the right, the lessee is entitled to free ingress, egress and regress even after the lease is determined.¹⁰ But the lessee is not to be entitled to *exclusive* possession of the land, but only to so much possession as will insure to him the fruit of his labour.

770. (j) Lessee's interest transferable.—The right of transfer of the lessee's interest is an ordinary incident of a tenancy.¹¹ He is entitled to dispose of it in any way he chooses. But by transferring his interest he does not absolve himself from

¹ *Land Mortgage Bank of India v. Vishnu Gorind*, 1. L. R., 2 Bom., 670.

² *Ramalinga v. Samiappa*, 1. L. R., 13 Mad., 15.

³ *Id.*

⁴ Sec. 111 (g), post.

⁵ *Woodfall, Landlord and Tenant* (16th Ed.), 700.

⁶ *Id.*, p. 790; see also sec. 3, *Remarriage of Hindu Widows Act* (Act XV of 1850).

⁷ Co. Litt., 55b, note (1).

⁸ *Smith's Landlord and Tenant* (2nd Ed.), 248.

⁹ Co. Litt., 55b.; *Kingsbury v. Collins*, 4 Bing., 302; 29 R. R., 354; *Woodfall, Landlord and Tenant* (16th Ed.), 739.

¹⁰ *Hayling v. Olvy*, 3 Exch., 531 (545).

¹¹ *Venkatasastry v. Rani Kathamma*, 5 M. H. C. R., 327.

his liabilities as lessee. No doubt by transfer, he acquires the same rights against the sub-lessee, as his lessor has against him,¹ but his relation with the lessor does not cease on that account. But if the lessor consents to treat the assignee on the footing of the original lessee, there would be a privity of contract created between them, and the original lessee would then be no longer liable.² But a mere notice of assignment given to the landlord does not operate to put an end to the tenant's liability.³ If the lessor has provided against the lessee's right to transfer, the lease can then be no longer transferred,⁴ and if

Incidents of transfer. a transfer is made in contravention of the condition it may occasion forfeiture,⁵ or give rise to an action for damages. Thus where the lessee subject to the restriction against sub-letting, sub-lets the premises without applying to the lessor for permission, and the sub-lessee used them as a turpentine distillery, and they were destroyed by fire, it having been proved that the original lessee was aware of the purpose to which the sub-lessee may turn the demised premises, it was held, that the loss caused by fire could not but be regarded as the natural result of the breach of covenant for which the lessee was held responsible.⁶ If the rule were otherwise, the lessee would be at liberty whenever he pleases to get rid of his contractual liabilities by assigning or sub-letting his term to a man of straw. A covenant not to assign runs with the land and would equally bind the lessee as well as those claiming under him.⁷

An assignment like a lease must be registered. But there are cases in which the assignee holding under an unregistered document was held liable to pay for his use and occupation of the land.⁸ An *assignment*, according to the English law, is contra-distinguished from a *sub-lease*, in that the former is for the *whole term*, whereas the latter is for a less period. A sub-lease too will require registration, if it is anything more than a license, and falls under sec. 107. For the purpose of registration an assignment must be distinguished from an agreement to assign. Thus "an agreement to assign on payment of a sum by instalments, the assignee in the meantime to perform the covenants in the lease and keep the assignor harmless and the assignor to re-enter on non-payment of any instalment, is merely an agreement for an assignment and not an assignment."⁹

771. Assignee's liability to the lessor.—An assignee of term is bound to fulfil all his obligations to the assignor. But being in possession of the land, he is also bound to perform all the

¹ Sec. 109, post.

² *Sasi Bhushun v. Tara Lal*, I. L. R., 22 Cal., 494; *Smith v. Gronow* [1891], 2 Q. B., 264 (897).

³ *Sasi Bhushun v. Tara Lal*, I. L. R., 22 Cal., 494 (500).

⁴ Sec. 10, ante.

⁵ Sec. 111 (g), (1).

⁶ *Lepin v. Rogers* [1898], 1 Q. B., 31 (37).

⁷ *Williams v. Earle*, L. R., 3 Q. B., 739.

⁸ *Gaya Prasad v. Buij Nath*, I. L. R., 14 All., 176; and see the commentary on sec. 107, ante.

⁹ *Hartshorn v. Watson*, 5 B. & C., 477; *Woodfall, Landlord and Tenant* (16th Ed.), 270.

covenants which run with the land. But he is not bound by the personal covenants of the lessee. In other respects it would appear, that in the absence of any stipulations to the contrary, his rights and liabilities would be determined in the same way, as if the assignor were the lessor, and the assignee, the lessee. Where the assignment is by way of mortgage, the mortgagee's position is in all respects similar. But where it is intended to minimize his liability the practice is to demise the property to the mortgagee at a peppercorn rent, reserving the last day or last few days of the term, and to make the mortgagor covenant to pay the rent and perform the covenants of the original lessee.¹ Where the assignee or sub-lessee uses the property in a destructive manner, he may be restrained by an injunction from the lessor.² Where by reason of there being no privity of contract, the lessor cannot sue the assignee or sub-lessee alone, he may in every case be joined as a co-defendant, the lessee being impleaded as the principal defendant. Where two properties are jointly let, and one of them is sub-let, the sub-lessee of one of the properties would ordinarily be liable for any breach of covenant affecting the two.³

It has been stated that the assignee is liable directly to the lessor in respect of all the covenants running with the land. Now since a covenant to pay rent is a covenant running with the land, it follows that the assignee is directly liable to the lessor for the payment of rent. But in such a case the assignee is liable to pay rent only in respect of land in his possession,⁴ and he is not liable for the rent which may have accrued due prior to his taking possession, unless the claimant can shew special circumstances which make him liable.⁵ No doubt while the lessor is entitled to sue both, the lessee upon his express covenant and the assignee upon the privity of estate, the lessor can have in such a case execution against one only.⁶ After the lessee assigns his term he cannot during the subsistence of such term relinquish his lease in derogation of the assignee's rights, and any surrender made by him would not affect the latter's rights.⁷ "If a tenant holds land for a term," says Sir Barnes Peacock, "and underlets that land, he cannot determine the interest of his under-tenant by surrendering his term to the landlord, because from the date of his underlease he has parted with his own interests in the land to the extent of the interest created by the underlease."⁸ The fact is that where a lessor consents to his lessee sub-letting, the sub-lessee obtains rights against both, of which he cannot be deprived without his consent, so long as he performs the conditions attaching to his

¹ Robbins on Mortgages, 156.

² *Clements v. Welles*, 1 Eq., 209.

³ *Oresswell v. Davidson*, 56 L. T., 811.

⁴ *Kamala v. Ranga Rao*, 1 M. H. C. R., 24.

⁵ *Macnaghten v. Lalla Mawa Lall*, 3 C. L. R., 285.

⁶ *Kunhanujan v. Anjelw*, I. L. R., 17 Mad., 296.

⁷ *Khiali Ram v. Nathulal*, I. L. R., 15 All., 219, F. B.; *Hoolassee Ram v. Pursottum Lal*, 3 N.-W. P. H. C. R., 68; *Hiramones v. Gunga Narain*, 10 W. R., 884; *Nehaloonnessa v. Dhunoo Lal*, 13 W. R., 281; *Badri Prasad v. Sheodhan*, 16 A. W. N., 109; *Fenabaramanier v. Ananda*, 5 M. H. C. R., 120.

⁸ *Hiramones v. Gunga Narain*, 10 W. R., 884.

occupation.¹ And it has been held that where a landlord sues a sub-lessee not to enforce the terms of the original lease given by him but on the terms of the sub-lease given by his lessee, he is subject to the terms in favour of the sub-lessee in the sub-lease and the liabilities that bore upon the lessor of that sub-lease.²

772. Proviso.—The proviso here is the same as in sec. (6) (i) An occupancy holding in Bengal is not transferable by custom.³ (§ 57).

773. (k) Lessee's obligation to disclose certain facts.—The lessee like the vendee is bound to a certain extent to protect the interests of his lessor. As the purchaser is enjoined "to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest,"⁴ so according to the clause is the lessee in relation to the lessor is similarly liable. But while the conduct of the seller in the case of non-disclosure is deemed to be fraudulent, it does not appear how the conduct of the lessee, who fails to disclose any fact, which materially increases the value of such interest, is to be regarded,—presumably it is not to be regarded as fraudulent, and there is also no provision for forfeiture of the lease on the breach of the duty. The only remedy then left to the lessor in such a case is to sue for compensation.

774. (l) Lessee must pay rent.—Rent being the consideration for the lease, the lessee is bound to pay it to the lessor, and in the event of its falling in arrears, even interest upon the amount may be allowed. And where it is stipulated that, on failure to pay rent by a certain day rent at an enhanced rate would become payable, the stipulation is enforceable unless it is relieved against on the ground of its being exorbitant or penal. Thus where in a deed of lease, the lessee undertook to pay the revenue due to Government, the interest due on a mortgage executed by the lessor and 40 mudies of rice as rent to the lessor; and it was provided that, if the lessee failed to pay any of these items in time, he should pay an additional rent of 5 mudies to the lessor, it was held that the agreement to pay additional rent could not be treated as a penalty, but that it must be regarded as a promise to pay liquidated damages which the lessor was entitled to recover.⁵ (Cf. § 587.) Where the landlord is otherwise entitled to

¹ *Narayan v. Venkati*, B. P. J. (1886), 14.

² *Narayan v. Augustin*, B. P. J. (1887), 337.

³ *Durga Charan v. Kali Prasanna*, I. L. R., 25 Cal., 727; *Bhiram Ali v. Gopi Kanth*, I. L. R., 24 Cal., 355.

⁴ Sec. 55 (5) (a), ante.

⁵ *Ramanna v. Santamma*, 9 M. L. J. R.,

301; S. C., I. L. R., 32 Mad., 453; following *Wallis v. Smith*, 21 Ch. D., 243; *Lord Elphinstone v. Monkland Iron and Coal Co.*, L. R., 11 App. Cas., 333; cf. also *Muthayya v. Secretary of State for India*, I. L. R., 22 Mad., 100 (in which penal assessment was decreed).

claim interest, his mere omission to claim it for some years at the rate stipulated in the lease, would not amount to a waiver of his right.¹ And similarly the fact that the landlord has been receiving varying cash rents for a number of years does not give rise to an implied contract that the rent is to be paid in cash, but the landlord can revert to *varam* rate according to local usage at any time.² The clause does not specify when and how the rent is to be paid, but ordinarily it would be payable at the time and place at which similar payments are usually made. As to the time of payment in England rent becomes due on the morning of the day appointed for payment, and may be paid at any time before the midnight of that day,³ but where the landlord has to make a demand as he must before exercising the right of re-entry, it is laid down that

Time of payment. the demand should in every case be made before sunset so as to allow "sufficient

light to count the money,"⁴ but the demand must be, it is said, continued till sunset, and the man making the demand must remain on the land till then. A demand at one o'clock is held to be bad.⁵ Where the landlord is dead at the time of payment rent may be paid to his heir or agent.

Where no date is specified for the payment of rent its payment must be determined according to the nature of the tenancy, or local custom if any.⁶ Thus where the tenancy is yearly or monthly rent would ordinarily be payable at the end of the year or month of the tenancy respectively.⁷ "Where rent is reserved generally," says Woodfall, "and no mention is made, as is usual, of half-yearly or quarterly payments, nothing is due until the end of the year:"⁸ and where, after signing a written agreement which made no mention of the time when the rent was to be paid, the landlord asked the tenant how he would like to pay the rent, and the tenant replied quarterly, and the rent was accordingly paid quarterly, it was held that the rent was still due annually, and not quarterly.⁹ Where there is a general reservation of a yearly rent, a clause to put an end to the term, by notice expiring on any quarter day, will not make the rent payable quarterly.¹⁰ If rent is stipulated to be paid in advance, the intention must be clearly expressed, without which the presumption that the rent is payable afterwards cannot be rebutted.¹¹

Payment before the date on which rent is actually due is purely voluntary, and is in the nature of an advance made to the

¹ *Shyama Churan v. Henu Mollah*, 1. L. R., 26 Cal. 160; *Johory Lall v. Buiabb Lall*, 1. L. R., 5 Cal., 102.

² *Veakratramwaya v. Ganganua*, 9 M. L. J. R., 26.

³ *Dibble v. Bowater*, 2 E. & B., 564.

⁴ *Cole's Ejectment*, 413.

⁵ *Doc d. Wheelton v. Paul*, 3 C. & P., 613.

⁶ *Venktagiri v. Ramasami*, 1. L. R., 21 Mad., 413; *Parmanasieu v. Kandappa*, 8 M. L. J. R., 201; *Rama Naidu v. Sri Mahant*

Ramakissari, 10 M. L. J. R., 26.

⁷ Woodfall, *Landlord and Tenant* (16th Ed.), 423.

⁸ *Cole v. Burg Litch*, 264; *Com. Dig. Rent* (B), 8; *Gray v. Chamberlain*, 4 C. & P., 290; *Coomber v. Howard*, 1 C. B., 440.

⁹ *Turner v. Allsop*, Tyr. & G., 819.

¹⁰ *Collett v. Carling*, 10 Q. B., 783; 6 D. and L., 365. Woodfall, *Landlord and Tenant* (16th Ed.), 423.

¹¹ *Ib.*, p. 407.

landlord, and the tenant is in such a case not protected by the provisions of sec. 50 (*q. v.*) if the payment turns out to have been made to a man with defective title. But such a payment is good both against the landlord and in the case of his death before the rent-day against his executors.

The cause of action for a suit to recover rent arises when the rent becomes payable where a contract exists according to the contract, and, as stated before, in the absence of a contract according to usage.¹

775. Place of payment.—As to the place of payment rent is to be paid on the land, which is deemed to be the debtor, and also the place appointed by law.² But in this country in the absence of any controlling agreement it is customary for the tenant to pay rent at the landlord's *cutchery*, or other usual place of his business. And should the landlord have no village office, then the rent must, it would appear, be paid to him as it falls due wherever he may be found.³ It is lawful for the tenant to remit his rent by the post, but in such a case any loss occasioned thereby must be borne by the tenant, unless this mode of payment was adopted at the instance of the landlord, who would then have to bear the loss. But even in such a case the tenant must shew that in making the remittance, he himself had used due caution.

Mode of payment. Thus where he remitted money in currency notes he should register the cover. The landlord is not presumed to consent to the payment being made through the post, but as a rule very slight evidence indeed is requisite to show an implied recognition of that mode of payment. Payment of rent may also be validly made to the landlord's agent or any other person authorized by him to receive it. In the case of several co-sharers the rent must be apportioned on the principle laid down in secs. 36 and 37. But one of several joint lessors cannot sue in respect of a share of his rent only, even though he may join the other lessors as defendants.⁴ But in such a case a co-sharer may sue for the whole rent, and he is entitled to give a good acquittance to the lessee for all the rent due from him.⁵ The object of this rule is to prevent the lessee from being harassed by multifarious suits. But where the lessors have by consent of the tenant apportioned the rent as between themselves, the case then becomes different.⁶ And the better opinion seems to be that upon severance of the interests of the several landlords a suit for apportioned rent is maintainable provided that all the parties are brought upon the record. As it was observed in a recent case :

¹ *Rama Naidu v. Sri Mahant Rama Kiseori*, 10 M. L. J. R., 26; following *Venkatagiri v. Ramasami*, 1. L. R., 21 Mad., 418; *Paramasiva v. Kandappa*, 3 M. L. J. R., 201.

² *Ib.*, p. 425.

³ *Fukir Lal v. W. C. Bonnerji*, 4 C. W. N., 824 (826).

⁴ *Manohar Das v. Manzur Ali*, 1. L. R. 5

All., 40.

⁵ *Manohar Das v. Manzur Ali*, 1. L. R., 5 All., 4; *Sindhu Baisni v. Peary Mohan*, 1. L. R., 20 Cal., 107; *Peryash Lal v. Akhori Balgobind*, 1. L. R., 19 Cal., 735 (741).

⁶ *Pratap Singh v. Umrao Singh*, 11 C.P.L. R., 1.

"When a defendant is subject to a joint liability, it would without doubt be unjust to allow him to be sued by one of his joint-creditors, who could not release him from his liability to his other creditors. But there would seem to us to be no reason why the creditors should not be allowed to sever their mutual relations and sue their debtor separately for their shares of the debt, provided this be done in such a manner as to free the debtor from all further liability to any of them."¹ Apportionment may take place of the sum due for arrears, as well as with regard to the future.² Where the plaintiff co-sharer does not know if a portion of rent additional to what would constitute his share remains unpaid, or if the whole of the rent remains unpaid, he is allowed to sue in the alternative.³

It has been held in England in a case⁴ of doubtful authority, that the taking of a security for rent in arrear, such as a bond, bill of exchange⁵ or a promissory note, does not of itself amount to a payment of rent, nor bar the landlord's remedies peculiar to the recovery of rent; but this is a view which is scarcely likely to be followed in this country, as it having been open to the landlord to receive rent either in cash or otherwise, and the landlord having chosen to accept it in one way rather than in another, he cannot afterwards be allowed to repudiate his own act and hold the tenant liable for rent for which he has given him acquittance.⁶

776. (m) Lessee must preserve the property.—This clause imposes upon the lessee the duty of preserving the property from destruction or deterioration. He is no doubt entitled to use it, and therefore allowance is made for "the changes caused by reasonable wear and tear or irresistible force," but apart from the deterioration consequent thereon, the lessee is not authorized to either change its condition or damage it by reckless or negligent use. In the language of English law, the tenant is presumed to use the property demised to him in a tenant-like manner. He must undertake its ordinary repair, and where the property is a dwelling-house keep it "wind and water-tight." He is, however, not bound to rebuild or replace it. As Tindal, C.J., observed in one case:⁷ "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term or of greater value than it was at the com-

¹ *Raj Narain v. Ekadasi*, 4 C. W. N., 494 (496); following *Srenath v. Mohesh Chunder*, 1 O. L. R., 453; *Ishwar Chunder v. Ram Krishna*, 1 L. R., 5 Cal., 902. But cf. *Khandakar v. Mohinikant*, 4 C. W. N., 508 (511).

² *Raj Narain v. Ekadasi*, 4 C. W. N., 494 (496).

³ *Pergash Lal v. Akhouri Balgobind*, 1 L. R., 19 Cal., 735.

⁴ *Davis v. Gyle*, 2 A. & E., 624.

See Woodfall, *Landlord and Tenant* (16th Ed.), 427. [*Davis v. Gyle* seems to bear very

hardly on the tenant, and although it is not likely to be overruled, it is submitted that it is incorrect, on the ground that the acceptance of a negotiable security constitutes an implied suspension of the right to distrain, and that the substitution of a simple remedy upon a note for the more cumbrous remedy otherwise open to the landlord is a good consideration."]

⁶ See sec. 62, Indian Contract Act (Act IX of 1872).

⁷ *Gutteridge v. Munyard*, 7 C. & P., 129.

mencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which so far as it results from nature, falls upon the landlord." So also, observed Lord Esher, M. R.:¹ "You have then to look at the condition of the house at the time of the demise, and amongst other things, the nature of the house—what kind of a house it is. If it is a timber house, the lessee is not bound to repair it by making a brick or a stone house. If it is a house built upon wooden piles in soft ground, the lessee is not bound to take them out and to put in concrete piles." The effect of these cases is "that if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair."²

777. Thus then all that the tenant is presumed to do is to take reasonable care of the property and attend to its ordinary repairs. He is not liable to reinstate the property if it is destroyed by flood or fire or by some other "irresistible force,"³ mentioned in cl. (c). Of course in such a case the tenant cannot get over his liability if it can be shewn that the destruction of the property was caused or materially accelerated by the wilful act or default of the lessee. Thus, where for example if it can be shewn that the fire was lighted intentionally, or that it was produced by negligence, the lessee would be clearly liable.⁴

Then, again, the clause would be clearly inapplicable where the lessee has expressly covenanted, as for example, "to keep the premises wind and water-tight and in habitable condition," in which case he would be bound by his covenant irrespective of whether or not the damage was caused by an earthquake or any other irresistible force. As has been observed by Maclean, C. J.: "The parties have made their own terms as to the condition in which the lessee is to keep the property, and as to the condition in which the premises are to be delivered up at the end of the term of the lease. In the absence of such a contract subsection (m) says what the rights and liabilities of the contracting parties are to be; but it has no application when the parties have fixed their own terms, and made their own bargain."⁵ But of course, in such a case all that the lessee can be compelled to

¹ *Lister v. Lane and Nesham* [1893], 2 Q. B., 212 (216).

² *Per* Lord Esher, M. R., in *Lister v. Lane & Nesham* [1893], 2 Q. B., 212 (216, 217).

³ See cl. (c), *supra*; in England the tenants are declared by statute 14 Geo. 3 Ch., 78, sec.

86 (Building Act), to be not answerable for any destruction caused by accidental fire.

⁴ Woodfall, Landlord and Tenant (16th Ed.), 690.

⁵ *Heehle v. Teliery*, 4 C. W. N., 521.

do in virtue of his contract, is to make good the damage caused to the premises only to the extent of making them wind and water-tight and in habitable condition. He is not bound to reconstruct or to redecorate them. All that he is bound to do is, as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.¹

In the case of the property being in disrepair, the landlord is empowered to serve the lessee with a notice which may or may not be in writing, and thereafter the lessee is bound to make the repair within three months, from the date of its service upon him. In England without a stipulation empowering him to do it, the landlord cannot enter upon the property for the purpose of examining its condition,² but under the clause the lessor in this respect possesses enlarged powers. But while he can enter upon the property with the limited object of viewing the state of repair, he cannot, without the consent of the lessee, repair it himself, and in this respect the law appears to be uniform in both countries.

778. Lessor's remedy.—In the case of non-repair the lessor's only remedy is by an action for damages which he is entitled to maintain during the continuance of the term. As to the measure of damages in such cases, it has been held that the amount which should be awarded is not the amount necessary to put the premises into repair, but the equivalent in money of the depreciation in the saleable value of the property in consequence of non-repair. The landlord is not bound to expend the damages recovered from the lessee in repairing the property, for which the latter still remains liable, and for which he may be similarly sued again and again until he performs his implied covenant.³ The amount which the lessor obtains by way of damages for breach of the covenant is given *for the injury* to the reversion, and not as being the sum then required to put the premises into repair. But although this is the law, there is practically no difference between the amount given for the diminution of the value of the lessor's estate by reason of the non-repair, and the actual cost of repair, since it is seldom that the diminution can be more than the cost of repair. And from the principle it follows that it is no answer to the lessor's claim for damages that the demised premises are to be pulled down, or that the lessor has entered into an agreement with a second lessee to put the premises into the same state of repairs as was required by the first lessee after his right. As it was observed by Fry, L. J., in a case:—“How can subsequent perform-

¹ *Proudfoot v. Hart*, L. R. 25 Q. B. D., 42; followed in *Heckle v. Telfery*, 4 C. W. N., 521; to the same effect in *Belchet v. Muckintosh*, 8 C. & P., 730; *Payne v. Haine*, 16 M. & W., 541; *Muntz v. Goring*, 4 Bing. N. C. 451; *Stanley v. Toogood*, 3 Bing. N. C., 4. [The terms “habitable repair” and “tenantable repair” import the same

meaning, per Lord Esher, M. R., in *Proudfoot v. Hart*, L. R., 25 Q. B. D., 42 (51)]. Ed.), 690.

² *Neale v. Wylie*, 5 B. & C., 583; 27 R. R., 418.

³ *Henderson v. Thorn* [1898], 2 Q. B., 164; but see *Joyner v. Weeks* [1891], 2 Q. B., 31.

ance by the second lessee of the covenants which he has entered into abridge or take away the cause of action that vested in the lessor before the second lease took effect?...As a general rule, I conceive that, where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence. I can find nothing in the existence of this reversionary lease, whether I regard its operation before or after the vesting of the plaintiff's cause of action, to interfere with the application of the general rule as to the measure of damages in such cases."¹ Where, however, the term is about to expire, it would be useless to trust to the lessee to repair the premises, and in such a case the lessor has been held entitled to recover the amount composed of the sum, it will take to put the premises into the state of repair in which the tenant ought to have them according to his covenant, and the measure of damages for the breach of covenant to keep in repair during the currency of the term.² Again, the measure of damages for breach of a covenant to keep demised property in repair, is not the same in the case of an underlease as in that of a direct lease. Where the underlessee has notice that there is a superior landlord, the immediate lessor's liability over to that landlord must be taken into account; and the cost of putting the property into repair at the end of the term may properly be considered for that purpose.³

The liability of the lessee to damages is not affected by the mode in which the lease is determined. Hence whether the lease is determined by forfeiture or by efflux of time, the lessor's remedy is in no way impaired.⁴

779. (n) Notice of encroachment.—The lessor covenants with the lessee to secure him quiet enjoyment. And it is to the interest of the lessee to be allowed to retain undisturbed possession of the demised property during the period of his lease. It is therefore to his interest that he should inform the lessor of any attempt made to encroach upon or interfere with the demised property. Being in physical possession of the property the lessee is likely to be sooner apprized of any encroachment thereon than the lessor, and it is therefore a duty which the lessee is from the nature of his position bound faithfully to discharge, and from which *à fortiori* it follows that he is not entitled to make any encroachments himself, and if he does so, he does not in respect of the land encroached upon acquire any adverse title. Thus in sec. 90 of the Indian Trusts Act,⁵ it is enacted that "where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in

¹ *Joyner v. Weeks* [1891], 2 Q. B., 31 (47, 48); followed in *Saras Ali v. Subraya*, I. L. R., 20 Bom., 439 (449).

² *Per Lopes, L. J.*, in *Ebbetta v. Conquest* [1895], 2 Ch., 377 (384); affirmed in appeal in *Conquest v. Ebbetta* [1896], A. C., 490.

³ *Ebbetta v. Conquest* [1895], 2 Ch., 377; affirmed in appeal in *Conquest v. Ebbetta*, [1893], A. C., 490.

⁴ *Saras Ali v. Subraya*, I. L. R., 20 Bom. 439 (449).

⁵ Act II of 1882.

such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage." Accordingly it has been held that the lessee making encroachments upon land adjoining to, or even in the neighbourhood of his holding, must hold the area encroached upon for the benefit of the lessor to whom it is to be delivered up with the property demised,¹ and if he has acquired a title against the third person by an adverse possession, he has acquired it for his landlord, and not for himself.² In such a case limitation against the landlord does not begin to run until after the determination of the lease,³ after which he may maintain an action for possession at any time within twelve years under article 144 of Schedule 2 of the Limitation Act.⁴ And this is the case even where a trespasser ejects the tenant.⁵ Neither this clause nor cl. (d) enable the lessee to encroach upon the land of his landlord without his consent, so as to acquire any rights over the land so encroached upon, and from which he may not be ejected as a trespasser.⁶ But if he has once elected to treat him as a tenant, he cannot then sue to eject him as a trespasser. The option to treat a tenant as a tenant or a trespasser with regard to the encroached area is one which the landlord must exercise as soon as he becomes aware of the encroachment. And after he has once made his choice he cannot then be allowed to change his position.⁷ The tenant cannot acquire even a right of easement adversely to the landlord.⁸ But if it appears that a tenant has for a great many years used a particular piece of land along with other tenants for a limited purpose, e.g., as a threshing-floor, it may be found, in the absence of any evidence to the contrary, that the right to use the plot of land for that purpose was part of the contract of tenancy.⁹

It would appear that where the lessee fails in his duty to give notice of the encroachment with reasonable diligence which is a question of fact in each case, he would be liable in an action for damages.

780. (c) Lessee must use the property prudently.—This clause must be read as subject to cl. (b), and its provisions

¹ See cl. (d); *Nudityarchand v. Meajan*, I. L. R., 10 Cal., 820; *Gooroo Doss v. Issur Chunder*, 22 W. R., 246; followed in *Eudni v. Damodar*, I. L. R., 16 Bom., 552.

² *Nudityarchand v. Meajan*, I. L. R., 10 Cal., 820; *Kingsmill v. Millard*, 11 Ex., 818; *Andrews v. Hailes*, 2 E. & B., 249; *Gooroo Doss v. Issur Chunder*, 22 W. R., 247.

³ *Krishna Gobind v. Hari Churn*, I. L. R., 9 Cal., 367; followed in *Sharat Sundari v. Bhobo Pershad*, I. L. R., 18 Cal., 101; and see *Woomesh Chunder v. Raj Narain*, 10 W. R., 15; *Nuddyar Chand v. Meajan*, I. L. R.,

10 Cal., 820.

⁴ *Sharat Sundari v. Bhobo Pershad*, I. L. R., 18 Cal., 101.

⁵ *Ibid.*

⁶ *Prohlad Teor v. Kedar Nath*, I. L. R., 25 Cal., 302.

⁷ *Khondakur v. Mohini Kant*, 4 C. W. N., 508; *Prohlad v. Kedar Nath*, I. L. R., 25 Cal., 302.

⁸ *Udit Singh v. Kashi Ram*, I. L. R., 14 All., 185.

⁹ *Datal v. Bhajju*, I. L. R., 16 All., 181.

may be compared with those of sec. 66, which similarly provide for the case of a mortgagee in possession (§ 460.) The lessee like the mortgagee is entitled to make use of the property, and is not liable for the deterioration caused by fair enjoyment. The standard by which, however, the lessee should be judged in this respect, would be that of a prudent man using his own property. The lessee is enjoined not to commit waste, such as by diverting the property to a purpose for which it was not leased, or by felling timber, or pulling down or damaging buildings, working mines not open when the lease was granted, or by committing any other act which is destructive or permanently injurious to the property. This rule prevails also in England where such acts would constitute what is known in the English law as Voluntary Waste, i.e., actual or commissive waste, as opposed to the permissive waste which is a matter of negligence or omission only. Thus, the

Voluntary Waste.

lessee has no right to dig a tank on the property demised for agricultural purposes, and if he digs one the lessor is entitled to compel him to fill it up, or obtain in the alternative the cost of filling up the tank himself.¹ But he cannot on that account eject the lessee.² Tenants of land under cultivation are not entitled to convert it into a mango grove, and where the lessor finds his land being diverted to such a purpose, he can at once sue to have the young trees planted removed, and to fill up the pits dug and generally to have the land restored to the condition in which it was when it was let.³ But from this it must not be understood that the planting of trees is *per se* objectionable, for a tenant has clearly a right to plant trees on his holding so long as it does not materially affect the character of the holding. And even where a *patta* contains a clause prohibiting the planting of any new trees, the clause could not be enforced without shewing its reasonableness.⁴ And accordingly in one case it was held that the mere fact that the lessee had converted irrigable land into a cocoanut garden was no reason for determining his tenure.⁵ The building of a house on an occupancy holding is however objectionable,⁶ but not the digging of a well, especially if it is a *chaunda* well, or a well of only a temporary nature.⁷ Merely allowing the land to remain uncultivated cannot be regarded as waste, as there may be reasons, as for example draught, when it would be imprudent for a tenant to attempt to put a crop into the ground.⁸ Similarly it has been held in England that "if the tenant convert arable land into wood, or *de converso*, meadow into arable,

¹ *Tarini Charan v. Debnarayan*, 8 B. L. R. (Appx.), 60.

² *Monindro Chunder v. Monceruile*, 11 B. L. R. (Appx.), 40; *Noyra Messer v. Rupikun*, 1. L. R., 9 Cal., 600.

³ *Lakshmana v. Ramchandra*, 1. L. R., 10 Mad., 351; *Bholai v. The Rajah of Bansi*, 1. L. R., 4 All., 174.

⁴ *Krishna Dass v. Venkatappa*, 9 M. & J. R., 146.

⁵ *Venkayya v. Ramasami*, 1. L. R., 22 Mad., 39.

⁶ *Bholai v. The Rajah of Bansi*, 1. L. R., 4 All., 174; *Ramanulhan v. Zamindar of Ramnad*, 1. L. R., 16 Mad., 407.

⁷ *Bholai v. The Rajah of Bansi*, 1. L. R., 4 All., 174.

⁸ *Dinabhandu v. Lokanidhasami*, 1. L. R., 6 Mad., 322.

it is waste ; for it changes not only the course of husbandry, but creates a difficulty in the proof of the title. . . . If a tenant suffer arable land to lie fresh, and not manured, this is not waste, but ill-husbandry. If he pull down a malt-mill and build a corn-mill, it is waste ; so if he convert a corn-mill into a fulling mill, it is waste, though the conversion be to the lessor's advantage."¹ So in another case where a piece of land was leased to make a reservoir and the lessee instead of making a reservoir there sublet it for the purpose of its being used as a rubbish shoot. It was so used by the sub-lessee and by shooting rubbish he raised the level. In an action by the original lessor it was held that the acts of the sub-lessee amounted to waste, irrespective of the question whether the added material was offensive or inoffensive.²

781. It is not clear from the wording of the clause whether by the phrase "he must not use, or permit another to use, the property for a purpose other than that for which it was leased," it is intended to exclude the lessee from committing what would be classed as ameliorating waste in the English law, i.e., such voluntary waste as improves the demised property, but it may be taken for granted that the lessee is not by the terms of the clause precluded from making such improvements as would really enhance its value. In England ameliorating waste, is not *per se* actionable unless it can be proved that the lessor has thereby suffered substantial damages.³ Thus Sir George Jessel in one case summing up the law observed : "The erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance."⁴ And so in another case it has been maintained that to obtain an injunction against a defendant on the ground of "waste," the plaintiff must prove that what the defendant is doing is prejudicial to the inheritance ; if it improves the value of the land it is not "waste."⁵ Thus then, the fact whether a particular act does or does not constitute "waste" which may be restrained by an injunction is in such cases always a question of fact which must be decided upon the facts of each case. If a pasture land let as such, is converted into an arable land, the lessee would be certainly restrained. But where land is let for agricultural purposes, and the tenant converts it into a market garden, by raising thereon tomatoes, grapes, mushrooms and other vegetables, erecting for that purpose certain glass houses, it cannot be said that the land has been diverted to purposes other

¹ Woodfall, Landlord and Tenant (16th Ed.), 648 :

² *West Ham Central Charity Board v. East London Water Works Co.* [1900], 1 Ch., 624.

³ Similar words—"inconsistent with the purpose for which the land was let" used in sec. 93 (b) of the N.-W. P. Rent Act (Act XII of 1881) have been judicially interpreted to mean an act inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or

the altering the character of the land, as, for instance, turning it from agricultural land to building land. The phrase must be distinguished from another—"an act detrimental to the land" which means an act which injures the land itself: *Nadho Lal v. Sheo Prasad*, I. L. R., 12 All., 419.

⁴ *Doherty v. Allman*, 3 App. Cas., 706 ; *Jones v. Chappell*, 20 Eq., 539.

⁵ *Jones v. Chappell*, 20 Eq. 539 (541).

⁶ *Meux v. Cobley* [1892], 2 Ch., 253.

than those for which it was let.¹ But the law in this country so far differs from the English law, that while under the latter permanent buildings may be constructed upon the demised property under the Act, the lessee is not at liberty to erect any permanent structures on the property, except for agricultural purposes.² So, where an agricultural tenant, at a time when there were no crops growing on his holding, let part of it temporarily to a theatrical company for the purpose of their holding theatrical performances thereon, it was held that it could not be said that the land had been diverted to a different purpose so as to incur forfeiture.³

The lessee is in no way empowered to open out new quarries or mines,⁴ nor make bricks upon land not specifically let for the purpose.⁵

782. "Voluntary waste", says Woodfall, "chiefly consists in felling timber trees, pulling down houses, opening mines or pits, or changing the course of husbandry. Whatever does a least damage to the freehold or inheritance is waste; therefore, removing wainscots, floors or other things once fixed to the freehold of a house is waste; and if the windows be broken or carried away it is waste, although they were glazed by the tenant himself, for glass is part of the house. If a house be destroyed by tempest, lightning, or the like, which is the act of God, it is not waste; but if the house be uncovered by tempest, it is said that a tenant for years must repair it, even though there be no timber growing upon the ground, for the tenant must at his peril keep the house from wasting.⁶ Waste may be done in houses by pulling them down, or suffering them to be uncovered, whereby the rafters, or other timber of the house, become rotten; but merely suffering them to be uncovered without rotting the timber is not waste, or if the house be uncovered when the tenant comes in, it is no waste to suffer it to fall down, although it would be otherwise if the tenant were to pull it down, unless he re-erect it again forthwith; but if a house built *de novo* was never covered in, it is not waste to abate it. If a lessee permit the walls to decay for default of daubing or plastering, that is waste, and if he suffer the houses to be wasted, and then fell down timber to repair the same, it is double waste; it is also waste not to repair fences."⁷ Where the lessee plants fruit trees, the property in them, is by the general law vested in the proprietor of the land, subject, of course, to any custom to the contrary.⁸ But where the lessor grants the lease of a *morcha* for

¹ *Ib.*

² *Cl. (p)*, post.

³ *Yusuf Ali v. Hira*, 1. L. R., 20 All., 400. [A case under the N.-W. P. Rent Act, Act XII of 1881, sec. 93 (b).]

⁴ *In re Furmanandas*, 1. L. R., 7 Bom., 109.

⁵ *Anand Coomarr v. Bissonath*, 17 W. R., 416.

⁶ But see *cl. (f)*, supra.

⁷ Woodfall, *Landlord and Tenant* (16th Ed.), 647, 648; citing *Co. Litt.*, 58a, et. seq.; *Smith's Landlord and Tenant* (2nd Ed.), 262.

⁸ *Nasir Chandra v. Ram Lal*, 1. L. R., 22 Cal., 742; *Kausalia v. Gulab*, A. W. N. (1890), 72; *Imda Khan v. Bhagirath*, 1. L. R., 10 All., 169; *Ruttonjee v. The Collector of Thana*, 11 M. I. A., 295.

the express purpose of clearing jungle land and bringing it under cultivation, and no reservation of the right in the trees is made in the lease, the lessee has a right to appropriate the trees when cut.¹

783. Estoppel against landlord.—The provisions of this clause may become inapplicable where voluntary waste on the part of the lessee is shown to have been acquiesced in by the landlord. Thus in a case where the sub-lessee from a holder of a small *jote* from a zemindar had used the land for brick-making, and it was shewn that the land had been continuously so used for a period of twenty-five years, the fact was held to raise a strong presumption of acquiescence on the part of the landlord, and he was held no longer able to move for an injunction.² Here, there can be no doubt that but for the presumption raised from long continuous user the lessee would have been restrained, as no one can make bricks any more than build upon lands not specifically let for the purpose.³ But in order to raise a case of estoppel, it is not necessary to prove continuous user for so long; for it has been held by Wilson, J., that where the landlord is shewn to have stood by for more than three years, and suffered the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord is not entitled to a mandatory injunction, although it cannot be said that under the same circumstances he would not have been held entitled to obtain damages.⁴

784. (p) Lessee must not raise permanent structure.—The tenant is entitled to construct permanent buildings for agricultural purposes, and for no other purpose. In England, however, the lessee is entitled to construct permanent buildings irrespective of any purpose, and ordinarily these fall within the category of what is there known as an "ameliorative waste," against which the lessor can have no relief unless he is shown to have suffered substantial damages.⁵ By this clause, however, no ameliorative waste of this nature is permitted, and the lessee cannot raise any permanent structure even with the object of improving the land, unless it be for agricultural purposes. In this respect the clause has introduced a novelty, for before the Act, it was held that the building of a pucca house upon land which has ceased to be agricultural could only have the effect of improving the value of the property and giving the landlord a better security for his rent.⁶

Under the clause, only an agricultural lessee could construct permanent structure, for if a non-agricultural lessee attempted it,

¹ *Zon, Mohini v. Raghoonath*, I.L.R., 23 Cal., 209.

² *Tarinee Churn v. Ramjee Pal*, 23 W.R., 208.

³ *Anand Coomar v. Bissonath*, 17 W.R., 416.

⁴ *Nayna Misser v. Rupikun*, I. L. R., 9 Cal., 609. [The Judge, however, suggested in this case that, although a stronger case must necessarily be made out to obtain an

injunction,—see sec. 56 of the Specific Relief Act, still in such a case, as the above, a suit for damages would undoubtedly have been appropriate.]

⁵ *Meux v. Cobley* [1892], 2 Ch., 358; *Jones v. Chappell*, 20 Eq., 530.

⁶ *Prosser Coomar v. Jagun Nath*, 10 C. L. R., 25; overruling *Jagannath v. Prosser Coomar*, 9 C. L. R., 221.

although with a view to use the buildings so constructed for agricultural purposes, the lessee would be using "the property for a purpose other than that for which it was let," within the meaning of the last clause. Permanent structures apart, it does not appear that the lessee is not entitled to commit other "ameliorating wastes" permitted by the English law.

785. (q) Lessee must restore possession.—On the determination of the lease it is the duty of the lessee to deliver up possession of the property. Mere non-occupation and non-cultivation of the demised premises is not enough, and nor does the denial by the defendant in a former suit that he occupied the land amount to a notice of surrender.¹ Upon the determination of his term what the lessee has to do is not merely to relinquish the land, but to give his lessor vacant possession of the property with all its accessions.² Of course before he gives up possession, he is entitled to a notice to quit, the duration of which must depend upon the length of the term and the conditions of the tenancy. Thus in a tenancy created by a *kabuliat* with an annual rent reserved, a tenant is entitled to a six months' notice expiring at the end of the year of the tenancy before he can be ejected.³ And even a lessee who promises to give back the land when the landlord would demand it cannot be ejected in the middle of a year without notice.⁴ Where a notice of a particular duration is stipulated for, it must invariably be given before the lessee could be ejected. In other cases such notice as is required by sec. 106 must be regarded as a condition precedent to the lessee's ejectment.

786. As soon as possession becomes due it is the duty of the lessee to deliver it up to his landlord. If, therefore, the property is in possession of sub-lessee he must get him out, for otherwise he cannot give his landlord complete possession. The latter may in such a case successfully maintain a suit for ejectment against the sub-tenant and he would also be entitled to recover damages from the lessee including also the costs of ejecting the sub-lessee.⁵ As Lord Kenyon observed that when "a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term."⁶ So also Cockburn, C. J., in another case, said: "The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at the end of the term; he is entitled to a sum equivalent to the rent which he has lost, and to the expenses

¹ *Venkatesh Narayan v. Krishnaji*, 1 L. R., 8 Bom., 160; *Balaji Sitaram v. Bhikaji Soyare*, ib., 164; *Rajagopala v. Collector of Chingleput*, 7 M. H. O. R., 98.

² *Baliaramgiri v. Vasudev*, 1 L. R., 22 Bom., 248.

³ *Kishori Mohan Roy v. Nund Kumar*, 1 L. R., 24 Cal., 720.

⁴ *Balkrishna v. Jasha Farsi*, 1 L. R., 19 Bom., 150; *Ram Lal v. Dina Nath*, 1 L. R., 28 Cal., 200 [in which the ejectment suit was held to be in itself a sufficient notice to quit].

⁵ *Henderson v. Squire*, 4 Q. B., 170.

⁶ *Harding v. Crethorn*, 1 Esp., 57.

he has been put to in taking legal proceedings to oust the sub-tenant from a wrongful possession.¹ Thus then the rent payable by the lessee continues to run so long as he does not make over the property to the lessor. And the possession he is required to give is of the *entire* property leased, and hence if he fails to deliver only a portion of the property his liability for the entire rent does not cease.² A tenant of land, immediately adjoining other lands of his own, is bound to keep the boundary between his own land and his landlord's distinct during and at the expiration of the term, and it is his duty to deliver up the property clearly distinct and nor in any way confounded with his own.³ And if the lessee fails in his duty in this respect, the lessor has the right to have the physical boundaries laid down at his cost. And in such a case the tenant is clearly bound to show where his landlord's land was situated, and if he fails to do so, a part of the property with which it was mixed up and equal to its annual value should be set out and made over to the landlord.⁴

787. Although no notice in specific terms need be given to the lessor by the lessee of his having surrendered up the property, still some intimation of relinquishment must be invariably conveyed to the lessor, so as to put him in the way, if he desired it, of resuming possession.⁵ And the lease cannot be said to be determined until the lessor is informed of it, and the lessee would therefore until then be clearly liable for rent.⁶ But a fair presumption of notice may arise from the conduct of the tenant, as where he leaves the land uncultivated and has not paid rent for five years,⁷ or for a sufficiently long time.⁸ In the case of joint leasees, the resignation of some does not necessarily operate to void the lease.⁹ But one of several joint lessors is competent to eject a lessee after expiry of the term.¹⁰ A manager of a joint Hindu family cannot relinquish a *jote* for a member of the family in whose name it stands.¹¹

788. Compensation for improvement.—Ordinarily the lessee is not entitled to any compensation for the buildings erected by him on the demised property,¹² unless, of course, they have

¹ *Henderson v. Squire*, 4 Q. B., 170 (178); followed in *Baliaramgiri v. Vasudev*, 1 L. R., 22 Bom., 348.

² *Lalla Nukehdall v. Futteh Bahadur*, 24 W. R., 29; *Saroda Soonduree Debtee v. Hasee Mahomed*, 5 W. R. (Act X), 78.

³ *Attorney-General v. Fullerton*, 2 V. & B., 264; *Spike v. Harding*, 7 Ch. D., 871; *Dugappa v. Vidhia Purna*, 1 L. R., 6 Mad., 268.

⁴ *Dugappa v. Tirthasami*, 1 L. R., 6 Mad., 263 (266).

⁵ *Venkatesh v. Krishnaji*, 1 L. R., 8 Bom., 160.

⁶ *Bonomaies v. Delu Sirdar*, 24 W. R., 118; *Venkatesh v. Krishnaji*, 1 L. R., 8 Bom., 160.

⁷ *Nuddear Chand v. Modhoooolun*, 7 W.

R., 158.

⁸ *Rajagopala v. Collector of Chingleput*, 1 M. H. C. R., 98; *Venkatesh Narayan v. Krishnaji*, 1 L. R., 8 Bom., 160; *Balaji v. Bhikaji*, ib., 164; *Chundermonce v. Sumbho Chunder*, W. R. (1864), 270; *Shoodan v. Ram Churn*, 2 W. R., 187; *Mutty Soonur v. Gundur Soonur*, 20 W. R., 129.

⁹ *Mohima Chunder v. Pelampur*, 9 W. R., 147.

¹⁰ *Mudan Singh v. Nurput Singh*, 2 W. R., 291; *Ebrahim v. Cursetji*, 1 L. R., 11 Bom., 544.

¹¹ *Bykunt Nath v. Bissonath*, 9 W. R., 268.

¹² *Husain v. Govardhan Das*, 1 L. R., 20 Bom., 1.

been erected by his consent or have been acquiesced in by him, in which case the landlord would be precluded from ejecting the tenant without compensation.¹

But to make out a case for compensation, the lessee must shew something more than mere knowledge on the part of the lessor, of the improvements made by him. Thus, if he has made any additions to the demised property without permission of his lessor, but apparently with knowledge and without any interference on his part, it has been held that, that does not amount to an acquiescence sufficient to enable the lessee to claim compensation.²

789. Certain local Acts, as for example, the Malabar Compensation for Tenants Improvements Act³ also enable the tenant to claim compensation for improvements.⁴

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor, as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may

¹ *Yeshwadabai v. Ramchandra*, I. L. R., 18 Bom., 66; *Dunia Lal v. Gupinath*, I. L. R., 23 Cal., 820.

² *Nannihal v. Ramachear*, I. L. R., 16 All., 523.

³ Madras Act I of 1887.

⁴ *Ib.*, secs. 3, 6 (c), 7; and see *Shanguni v. Veerappan*, I. L. R., 18 Mad., 407; *Kushi Chandu v. Kunkan*, I. L. R., 19 Mad., 384; *Uthunganakath v. Thazhakarayil*, I. L. R., 20 Mad., 435.

be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

790. Analogous law.—This clause may be compared with the corresponding provisions of the English law contained in the conveyancing and law of Property Act, 1881,¹ and which run as follows :—

"11. (1) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if as far as the lessor has the power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

58. (1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2) A covenant relating to land not of inheritance or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.²

* * * * *

59. (1) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2) This section extends to a covenant implied by virtue of this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained, the proviso only re-enacts the provisions of Act II of 1855,³ still in force in territories to which the Act has not been extended.

* * * * *

The second paragraph may be compared with secs. 6 (e) and 50. Under clause (e) of sec. 6, it has been held that the transferee

¹ 44 and 45 Vic., Ch. 41.

the Act.

² The clause omitted here and in sec. 50 only declares against the retrospectivity of

³ Sec. 1.

cannot sue for mesne profits accruing due before the transfer, and this clause similarly declares that the transferee cannot recover arrears of rent due before the transfer. The principle of allowing the transferee for payment of rent made to the lessor, in ignorance of the transfer, is embodied in sec. 50, the illustration to which exemplifies the case contemplated by the clause.

791. Principle.—This section is an illustration of the equitable principle that a man may renounce a right, but not one coupled with a duty. There can be no renunciation of rights and consequent destruction of duties prescribed by an absolute law.¹ As Innes, J., observed, “a man cannot assign obligations (i.e.,) cannot substitute some one else as the performer of his duties) without the consent or authority of those to whom the duties are owing.”² In enacting this section the Indian Legislature has considerably modified the corresponding provisions of the English Statute. For while according to the English law all the rights and liabilities of the lessor, on transfer, pass to the transferee, under the provisions of the section, while the rights pass, the liabilities do not unless the lessee elects otherwise. Under the English law the effect of the transfer is to transpose the assignee in the place of the assignor, but under the section the lessee is allowed to elect whether he shall hold the original lessor responsible to perform his covenants or hold the assignee of the reversion liable for their due performance. The policy of the law is thus deviating from the English rule was probably the same as prevents the lessee from getting rid of his liabilities by transferring the lease to a pauper or a man of straw. By transferring his lease the lessor is permitted to transfer all his rights, but he cannot thereby assign away his liabilities without the assent of the lessee who is solely interested in their proper discharge. There can be no doubt that by enacting the rule as it has been the chances of practising fraud upon the lessee by assigning away a lease to a person incapable of discharging the lessor's obligations are considerably minimized.

792. Meaning of words.—The purpose of the third paragraph is self-evident. “*But the lessor, &c.* :” this clause further explains what is conveyed clearly enough by the phrase “if the lessee so elects.” The meaning is that an assignment of the reversion does not presumably carry with it the liabilities of the lessor which can only be shifted by consent of the lessee. “*If the lessee, not having reason to believe :*” as where he has had no notice nor information regarding the transfer.

793. Rights of the transferee.—The rights of the lessor which pass with the transfer are usually those rights which are part of the covenants which run with the land. And similarly where the transferee is bound to discharge the liabilities of the lessor, he is no more bound than by the covenants running with

¹ *Cherukomer v. Gocinder*, 6 M. H. C. R., . . . ² *Ib.*, p. 161.

the land. These covenants besides those enumerated in the last section, are such as to pay rent, taxes, to repair, a condition for re-entry, or against sub-letting or for quiet enjoyment. Contradistinguished from these are the covenants which are merely *personal* and do not run with the land, and which are, therefore, not binding upon the assignee even though they be expressly named. The following are some instances of such covenants:—A covenant to give the lessee the option of pre-emption of a piece of ground adjoining the demised property,¹ or not to keep a building within a certain distance of the demised premises;² or a covenant to pay taxes in respect of premises other than those demised. The assignee of the reversion would be held liable to perform the former class of covenants, if the lessee so elects, but he is in no way liable to perform the latter class of covenants, which were personal to his assignor.

An assignment being the transfer of the reversion would require registration. But it should be distinguished from what is merely an agreement to assign although by virtue of the latter the assignee may be liable to perform the covenants of the lease "in the meantime and keep the assignor harmless."³ As between the assignor and the assignee the former is presumed to covenant in the same way as with the lessee, namely, that the lease is in full force,⁴ that all the rent, covenants and conditions have been paid, performed and observed up to that time;⁵ that he has power to assign; that he would secure the lessee quiet enjoyment for the rest of the term,⁶ and that at all times after the date of the assignment he would be ready to execute and do all such lawful assurances and things as may be necessary to more perfectly assure the subject-matter of the conveyance to the assignee.⁷

No notice is required to be given of an assignment,⁸ but prudence dictates that it should be invariably given for there may be cases in which the assignee or the assignor may lose a great deal on account of the omission, as the lessee is absolutely protected from having to pay the rent twice over if he has paid it once to the lessor, and unless he elects otherwise he can continue to hold the lessor responsible for the due performance of the covenants for which he alone is primarily liable. The assignee is entitled to transfer his interest in which case the assignee will be liable in the same way as the assignor, except only as to previous breaches in respect to which the assignee would remain still liable. "Such an assignment may be made even to a pauper or to a person imprisoned for debt, but the assignee will continue liable upon any express covenant entered into by him in the agreement to himself."⁹ The assignee of a term is entitled to sue the

¹ Woodfall, Landlord and Tenant (16th Ed.), 176.

² *Thomas v. Haywood*, 4 Ex. Ch., 811.

³ *Hartshorn v. Watson*, 5 B. & C., 477.

⁴ Sec. 7 (D), Conveyancing Act, 1881 (44 and 45 Vic., Ch. 41).

⁵ *Ib.*

⁶ *Ib.*, sec. 7 (A).

⁷ *Ib.*

⁸ Woodfall, Landlord and Tenant (16th Ed.), 272.

⁹ Woodfall, Landlord and Tenant (16th Ed.), 273, 274.

assignor for a breach of any covenant running with the land, or the reversion, but it would appear for no other covenants.¹

794. His liabilities.—Besides the express covenants stipulated in the deed of transfer for the performance of which the assignee is of course liable, the assignee would it appears be liable to covenants of which he has notice. "It cannot, I think, be denied," says Sir G. J. Turner, L. J., "that generally speaking a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases ought not to be held to apply in the case of a tenant from year to year."² And accordingly it has been held by Jessel, M. R., that a lessee having notice of a deed forming part of the claim of title of his lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the lessor that it contains no restrictive covenants, nor anything in any way affecting the title;³ of course where the deed cannot be got at, or for some other reason, where, with the exercise of prudence, the lessee cannot see it, the case becomes different. The doctrine of constructive notice, must not, however, as observed by Sir W. M. James, V. C., in *Cartier v. Williams*,⁴ be carried too far, and it was accordingly held that in order to bind the lessee with restrictive covenants there must be evidence of actual knowledge or notice of it. Hence where the restrictive covenant was contained in a separate deed and not in the title-deed of the lessor and in which there was no reference to the separate agreement, it was held that the lessee was not bound to see nor inquire about anything more than the title-deed, and that he was therefore not bound by the restrictive covenant of which he had no notice.⁵

Although under the section the assignee is not primarily liable to the lessee, still there is nothing against the assignor's stipulating as between himself and the assignee that the latter shall perform all the duties for which he is liable. In such a case, the lessee could hold the lessor responsible, and the latter could equally hold his assignee liable for the due discharge of his liabilities.

The liability of the assignee commences from the date of the assignment, although he may not have then taken actual possession.⁶

The assignment contemplated by the section may be of the whole or of any part of the lessor's interest. Thus an assignment

¹ *Spencer's Case*, 1 Sm. L. C., 60.

² *Wilson v. Hart*, 1 Ch. 463 (467); see also *Tulk v. Moxhay*, 2 Ph., 774.

³ *Patman v. Harland*, 17 Ch. D., 353 (356); *Fielden v. Slater*, 7 Eq., 523.

⁴ 9 Eq., 678 (682).

⁵ *Id.*, p. 682.

⁶ *Hawkins v. Sherman*, 3 C. & P., 450; *Smartle v. Williams*, 3 Lev., 333.

may be a part of the lessor's estate, or for a limited number of years, or by a mortgage of the reversion.¹ Such transfers are governed by the same rules.

795. Proviso.—The transferee cannot claim interest accrued due before the transfer. Nor, even after the transfer, can he compel the lessee to pay rent to him twice over, if in ignorance of the transfer he has paid it to the lessor. The principle of the proviso is the same as of sec. 50, to which reference is invited for a fuller commentary. (§ 270.)

796. Apportionment of rent.—Where the lessor disposes of a part of the reversion, the rent must be apportioned, in the same way as when the lessee sublets a part of the demised property by consent of the landlord. The lessee may not, however, object to an alienation of a part of his interest by the landlord. All that he is entitled to say is that his interests shall not be jeopardized by the transfer, and this the law has expressly secured to him.² Both in England³ and under the section the lessee's concurrence is essential to a valid apportionment. For the purpose of apportionment "all rents, annuities, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."⁴ In apportioning rent, it would appear, regard must be had not to the quantity of the land transferred, but to the value of each part as improved by buildings, the quality of the land and other similar advantages.

The clause enacts that if the lessor, transferee and the lessee cannot decide among themselves as to the apportionment, the question may be referred to a competent Court for decision, such Court being the Court which would have jurisdiction to entertain a suit for the possession of the demised property. Similar jurisdiction to determine miscellaneous questions of this nature, is also vested in the Courts in other parts of the Act.⁵

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which term commences.

¹ Robbins on Mortgages, Ch. XII, p. 155.

² *Raj Narain v. Ekulasti*, 4 C. W. N., 494; following *Sreenath v. Mohesh Chunder*, 1 C.L. R., 468; *Ishwar Chunder v. Ram Krishna*,

1 L. R., 8 Cal., 902.

³ *Bliss v. Collins*, 5 B. & A., 870.

⁴ Sec. 2, Appointment Act, 1870 (38 & 34 Vic., Ch., 85); sec. 37, ante.

⁵ e.g., ss. 102, 103.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

797. Analogous law.—This section is framed in accordance with the provisions of the General Clauses Act,¹ sec. 9 (1), wherein it is provided that wherever the word “from” is used, the first in a series of days or any other period of time should be excluded, and wherever the word “to” is used, the last in a series of days or any other period of time should be included. Similarly it is enacted in the Limitation Act,² that “in computing the period of limitation prescribed for any suit, appeal, or application, the day *from* which such period is to be reckoned shall be excluded.” The English rule is in this respect exactly the same.

798. Principle.—This section provides a rule of construction, in accordance to which, whenever a lease is stated to commence from a particular day, that day shall be excluded in computing its commencement. But where no date is specified the lease would begin to run immediately. The law in England is the same. Thus in a case, where the plaintiffs, a tramcar company, effected with the defendants an insurance against “claims for personal injury in respect of accidents caused by vehicles for twelve calendar months *from* November 24th, 1887,” to the amount of “£250 in respect of any one accident,” and on November 24th, 1888, one of the plaintiffs’ tramcars was overturned, forty persons being injured, and the plaintiffs became liable to pay claims to the amount of £833 which they claimed to recover from the defendant company

on the strength of their policy, it was held that the effect of “from” in the expression was to exclude November 24th, 1887, and to include November 24th, 1888, in the period of the insurance, and that the defendants were therefore liable. In deciding the case Day, J., observed: “If space were in question, and a mile had to be measured ‘from’ a given place, it is obvious that no part of the place could be included in the mile. And, similarly, I cannot but think that, as regards time, ‘from’ is akin to ‘after,’ and excludes the date fixed for the commencement of the computation.

¹ Sec. 3 (2) (3), Act I of 1908; now see sec. (9) (1), Act X of 1907.

² Sec. 12, Act XV of 1877.

As was said in argument, had the words been 'for one day from November 24th, 1887,' it could not have been contended that November 24th, 1887, was itself included.¹ So in another case, where under the provisions of the Act for the Prevention of Cruelty to Animals² a complaint is to be made "within one calendar month after the cause of such complaint shall arise,"³ it was held that the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made.⁴ So again, in a case where a lease was made for twenty-one years from the 25th March 1809 it was held that the lease did not expire till the end of 25th March, 1830, Lord Denman, C. J., observing: "The general understanding is, that terms for years last during the whole anniversary of the day from which they are granted."⁵ But a demise by deed to hold from "henceforth" means from the day of the execution of the deed,⁶ and the same construction has been placed upon the phrase "from the day of the date."⁷

799. Option to determine lease.—Again a lease "for seven, fourteen or twenty-one years,"⁸ or a lease made in 1775 for "three, six or nine years determinable in 1788, 1791 or 1794"⁹ can only be determined at the option of the lessee at the end of the earlier periods. Where, however, the lease contains an express stipulation, as that it shall "be determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit," the case is taken out of the purview of the clause, and the lease is determinable only by consent of *both* the parties, although it may have been the intention of the parties to give the option to either of them.¹⁰ The clause is only intended to provide a rule of construction in the case of an ambiguity or omission, and therefore, where the stipulation on the point is clear, it would have no application. Hence lease may be expressly made determinable at the option of the lessor, or of his representative entitled to the term or reversion, the condition should be strictly enforced. It is only in the case of a *doubtful* grant that it is to be construed in favour of the grantee.¹¹

111. A lease of immoveable property determines—

(a) by efflux of the time limited thereby :

Determination of lease.

¹ *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Ass.* [1891],

1. Q. B., 402 (405).

² 12 & 13 Vic., Ch. 92.

³ *Ib.*, sec. 14.

⁴ *Rudcliffe v. Bartholomew*, [1892], 1 Q. B.,

161. For other cases in which the same

view was taken, see *Williams v. Burgess*, 12

A. & E., 685; *Hardy v. Ryle*, G. B. & C.,

403; *Styles v. Wardle*, 4 B. & C., 908.

⁵ *Ackland v. Luby*, 9 Ad. & El., 879; see

also *Willinson v. Gaston*, 9 Q. B., 187, and the cases cited therein.

⁶ *Clayton's case*, 5 Rep., 1; *Shewdlyn v. Williams*, Cro. Jac., 258.

⁷ *Underhill v. Horwood*, 10 Ves., 709.

⁸ *Ferguson v. Cornish*, 3 Burr., 1063.

⁹ *Goodright & Hall v. Richardson*, 3 T. R., 462.

¹⁰ *Fowell v. Framer*, 34 L. J., Ex., 6; *Woodfall, Landlord and Tenant* (16th Ed.), 168.

¹¹ *Price v. Dyer*, 17 Ves., 11 R. R., 102.

- (b) where such time is limited conditionally on the happening of some event—by the happening of such event :
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :
- (d) in case the interests of the lessee and the lessor in the whole of the property becomes vested at the same time in one person in the same right :
- (e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :
- (f) by implied surrender :
- (g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in the third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

800. Analogous law.—This section generally corresponds with the English law. Thus says Woodfall: "A tenancy may be determined in various ways, viz.—1. By effluxion of time, on the expiration of the term granted. 2. By the happening of some event upon which the term is limited conditionally. 3. By a surrender. 4. By merger. 5. By forfeiture and re-entry or ejectment pursuant to some proviso or condition in the lease, for breach of covenant, &c. 6. By a notice to quit, where the tenancy is from year to year, or for other like period (greater or less) determinable by notice. 7. By a notice to determine the term at the end of the first seven or fourteen years thereof, or at some other specified period, pursuant to a power in the lease. 8. By a disclaimer of the reversioner's title, where the tenancy is only from year to year, or other less period, and not for a term of years. 9. By death of the party during the continuance of whose life the contract of tenancy is made."¹

801. Principle.—The lease being a contract under which the lessee holds possession the lessee must deliver up possession, when under the terms of the contract his interest ceases. Again where the lessee acquires the interest of the lessor, his interest (as lessee) merges into the higher right which he has acquired, since no man can be both landlord and tenant at the same time of the same property. Before the lease falls in, he may also terminate it by express or implied surrender. And where the lessee has been guilty of a breach of the contract, in certain cases the lessor is allowed to re-enter upon the property and terminate the lease against the will of the lessee.

802. Meaning of words.—"By efflux of time limited thereby." i.e., on expiration of the period for which the lease is given.

803. Reasons for determination.—Ordinarily a lease is determined by efflux of time limited thereby. (a) **By efflux of time.** A lease is not a personal contract between the lessor and the lessee, but is an estate in land, which, when not expressly limited to the life of the lessee, passes to his heirs in the same way as any other property belonging to him devolves on him, and that if the heirs take the estate of the deceased lessee, they take it with all the rights and responsibilities attaching to it; and it is only in case of their refusal to accept the inheritance that the engagements entered into by the deceased cease to operate from the date of his death.² Similarly the lessor's heirs cannot repudiate a lease granted by their ancestor. They are as much bound by the lease and the covenants thereof as the original lessor, until expiration of the term upon which it is the duty of the lessee to deliver up the demised property to the lessor, who is not bound to give him

¹ Woodfall, Landlord and Tenant (16th Ed.), §12.

3 M. I. A., 261; *Shanik Danoolah v. Shanik Amanoolah*, 16 W. R., 147.

² *Maharaja Tej Chand v. Sri Kanta Ghose*,

any notice to quit, but may then at once proceed to sue him for possession and if necessary damages. But if the lessor then accepts rent from the lessee or under-lessee, he is presumed to have consented to his holding over, and the lessee cannot then be evicted until on expiration of the year or month according to the nature of the tenancy.¹ The lessee who holds over is, however, in no case to be deemed to be a trespasser whether the landlord accepts rent from him or not. His position is that of a tenant-at-sufferance, which is only another word for a licensee. A tenancy-at-sufferance is determined by the will of the landlord, or any act inconsistent with its continuance. In one case the tenancy was held to be determined by the fact of the owner having mortgaged the property of which the tenant had notice. No doubt in such a case a new tenancy would have been created if the mortgagee had allowed the tenant to continue in possession.²

804. The time for the determination of a lease may be fixed

(b) Conditional on a contingency.

in the usual way, or it may be limited, conditionally on the happening of some event. Thus where the term is limited, *e.g.*,

for forty years if the lessee or some other persons therein named shall so long live, the lease is determinable at the end of the forty years, or the death of the lessee or the other person therein named, whichever event may first happen.³ Where a lease provides that it shall continue only so long as the lessee remain in personal occupation of the property,⁴ or so long as he remain in the lessor's service,⁵ the term would be determinable, in the former case upon the lessee giving up possession, and in the latter case upon his quitting the lessor's service. So a lease of land whereby the lessee is empowered to hold it as long as he pleases is determined by his death.⁶ Where the lease is so determined the lessor may re-enter or maintain a suit for ejectment, although there may be no express provision in the lease for re-entry.⁷

805. If the lessor's interest is terminable on his death, or is

(c) Where limited by lessor's interest, &c.

dependant upon any other contingency, the lessee's interest cannot enure beyond that period. Where a tenant holds for the term

of another's life, he is in English law designated a tenant *per autre vie*, and it has been held that in such case the tenant may be compelled to produce his *cestui qui vie* or a person during whose life he holds.⁸ A lessee from a Hindu widow, or a person

¹ See sec. 116, *post*, and sec. 106, *ante*.

² *Jarman v. Hale* [1899], 1 Q. B., 994.

³ Woodfall, Landlord and Tenant (16th Ed.), 813; Cole on Ejectment, 402; Hughes and Crowther's Case, 13 Co. R., 66; *Brudenell's case*, 5 Co., R., 9.

⁴ *Doe d Lockwood v. Clarke*, 8 East., 185; 9 R. R., 402.

⁵ Woodfall, Landlord and Tenant (16th

Ed.), 813.

⁶ *Vaman Shripad v. Maki*, I. L. R., 4 Bom., 424; *Suleman v. Asmad*, B. P. J. (1877), 177; *Kalapa v. San Kalapa*, B. P. J. (1883), 310.

⁷ *Puddo Money Dossia v. Jholla Pally*, 7 W. R., 263.

⁸ *Hill v. Saunders*, 4 B. & C., 529; 23 R. R., 375.

having only a life-interest in the estate, would thus have to give up his lease upon the death of the *cestui qui vie*. Similarly a mortgagee from a lessee must deliver up the property on determination of the lease.¹ A grantor cannot transfer a larger estate than he himself has in the property. Hence where a life-tenant gives a perpetual lease and he and his heirs accept rent on the understanding that the lease was permanent, it does not thereby preclude the claim for legal rights, which no admissions made on the part of the grantors are sufficient to negative.²

306. Again if the lessee has acquired the lessor's interest in the property it operates as a merger, and the lease then becomes merged or drowned in the higher interest. In order to create a case for merger, there must, however, be the union of the two interests in the lessee at the same time and in the same right. Hence where the lessee acquires the lessor's interest through the intervention of a trustee, there can be no merger since the two rights are not vested in the same person.³ And similarly, if part of the lessor's interest is acquired by purchase, and the remainder by succession, there cannot be merger, since the whole interest has been acquired, not in the same, but in different rights. The principle of merger is that the same person cannot be both landlord and tenant of the same land—*nemo potest esse tenens et dominus*,⁴ the two rights being incompatible and inconsistent.⁵ "A particular estate will merge in a reversion of a shorter duration than itself; as if one be lessee for twenty years, and the reversion expectant thereon be granted to another for one year who grants it to the lessee, it will operate as a merger of the twenty years' term, and the term for one year will begin to run."⁶ The doctrine of merger now clearly recognized in the clause, does not appear to have been uniformly applied before the Act. Thus in one case Peacock, C. J., remarked: "My own impression is that the doctrine of merger does not apply to lands in the mofussil in this country."⁷ But in another case where a *putnidar* had purchased the zemindari rights in the mehal, it was held that his rights as a *putnidar* having merged he could not set up his title as such against his zemindari co-sharers in a suit brought by them for contribution.⁸ But this case does not appear to have been cited in a later case decided since the passing of the Act in which it has been held that there is no authority for holding that a *putni* interest must merge in the zemindari interest if they come into the same hands.⁹

¹ *Jarman v. Hale* [1899], 1 Q. B., 994.

² *Beni Pershad v. Dudhnath*, 1 L. R., 27 Cal., 156, P. C.

³ *Belaney v. Belaney*, 2 Ch., 188; *Lord Dynecor v. Tennant*, 18 App. Cas., 279.

⁴ "Nobody can be both the landlord and tenant (of the same property) at the same time."

⁵ Blackstone's Commentaries, II, 177; see

sec. 101, ante.

⁶ Woodfall, Landlord and Tenant (16th Ed.), 326.

⁷ *Womesh Chunder v. Raj Narain*, 10 W. R., 15 (17).

⁸ *Prosunno Nath v. Jogul Chunder*, 3 C. L. R., 159.

⁹ *Jibanti v. Gokool Chunder*, 1 L. R., 19 Cal., 760 (764).

807. (c) By surrender.—At any time during the currency of a lease, the lessee may surrender and yield up the term to either the lessor or to him who has the next immediate estate in remainder or reversion, provided that the surrenderee accepts it. There can be no express surrender unless both the surrenderer and surrenderee mutually agree that it shall take place.¹ The lessee cannot by merely relinquishing his holding after notice to the landlord make a valid surrender.² A surrender may be made at any time, and it is not necessary that the lessee should be in possession of the property

(1) **Express surrender.**

surrendered. Thus where the lease is to commence at a future day, the lessee may surrender his interest before the arrival of that day. But where he has assigned his term, or sublet it to another, his surrender can then be of no avail as against the assignee or the sub-lessee. In such case it may be said that the lessee having already parted away with his estate, has no more interest left with him, which he could surrender. He cannot give to the landlord what he has already given away to the transferee.³ No formalities are necessary to effectuate a surrender. In England, every surrender, by *the act of the parties* or express surrender must be in writing,⁴ and every surrender of a term of more than three years, made after the 1st day of October 1845, must be by deed.⁵ But writing is not absolutely necessary in this country,⁶ although no doubt where surrender is made under the provisions of local Acts in which writing is necessary, it cannot be validly made without writing. Thus under the Madras Rent Recovery Act—tenants are allowed “to relinquish their lands at the end of the revenue year by a writing to be signed by them in the presence of witnesses, or at any other time if the landlord is willing to accept the relinquishment.”⁷ But even this provision of law has been interpreted to have the effect of not rendering wholly void and inoperative

¹ *Coles v. Eranson*, 19; C. B. (N. S.), 392.

² *Judoonath v. Schoone Kilburn & Co.*, I. L. R., 9 Cal., 671; *Krishna v. Lukshminarayanappa*, I. L. R., 15 Mad., 67.

³ See sec. 115, *post*.

⁴ Statute of Frauds, 1677, A. D. (29 Car., 2 Ch., 3); sec. 1 of this statute provides that “all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, except (sec. 3) all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord

during such term shall amount unto two-thirds parts at least of the full improved value of things demised:” and (sec. 3) “No leases, estates, or interest, either of freehold, or term of years, or any uncertain interest, not being copyhold of customary interest, of, into, or out of any messuages, manors, lands, tenements, or hereditaments shall be assigned, granted, or surrendered unless it be by deed, or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.”

⁵ Sec. 3, Real Property Act, 1845, § and “Vic., Ch., 106.

⁶ *Muniruddin v. Mahomed Ali*, 6 W. R., 67; *Ram Ching v. Gorachand*, 24 W. R., 344.

⁷ Sec. 12, Rent Recovery Act (Madras Act VIII of 1865).

a surrender which, although not so recorded, has in fact taken place.¹ As regard the necessity of writing and registration, the Privy Council has now authoritatively laid down that in order to make a valid surrender a formal deed of reconveyance is not necessary.² And no particular form of words need be used to constitute a good surrender. In England the words, by no means essential but commonly employed, are "surrender, grant and yield up," "surrender and yield up" or "assign and surrender." But both in England and this country, the question is one of intention unequivocally expressed, the manner and form of expression being unimportant. Thus where in a case, the lessee executed a *razinama* in the following terms: "Up to the present time my father and I have been cultivating the land, but the land belongs to the *inamdar*. I have no title over it, and the *inamdar* can give it for cultivation to any one he pleases;" the document was held to be sufficient to operate as a surrender.³ Similarly a written request by the lessee to his landlord to relet the land, may, when acted upon, operate as a surrender, either express or by act and operation of law.⁴ In one case where in the course of a dispute the tenant said to the landlord: "I shall quit," and the latter said: "You may do so; and I shall be glad to get rid of you:" upon which the tenant sent the keys of the house to the landlord which he accepted and took possession, it was held that there was an implied surrender.⁵ But a written notice given by the tenant to quit at a time when he erroneously believed his tenancy to expire, does not operate as a surrender.⁶ A relinquishment intended but not effected is no relinquishment.⁷ And where there is no intention to surrender and yield up, it cannot be inferred from mere cessation in the payment of rent,⁸ although it may be for a period of twelve years.⁹ Surrender of part of the property does not *per se* operate as a surrender of the whole.¹⁰ Thus in a case where the plaintiff had let to a tenant a farm of 234 acres and some rights of pasturage on upland fells together with a flock of sheep at the rent of £35 a year, and by an agreement the tenant subsequently surrendered to the plaintiff, his landlord, a field of seven acres, part of the land demised, worth £10 a year, Cotton, L. J., in delivering the judgment of himself and Bowen, L. J., and in which the Master of the Rolls, Lord Esher, agreed, said:—"It was, however, argued that the effect of giving up the field must be a surrender of the old tenancy. We are of opinion that this cannot be maintained, and that, notwithstanding the surrender to a landlord

¹ *Narasimma v. Lukshmana*, I. L. R., 18 Mad., 124 (125).

² *Imambandi v. Kamleshari*, I. L. R., 14 Cal., 109 (119), F. B.

³ *Bhutia Dhondu v. Ambo*, I. L. R., 13 Bom., 294.

⁴ *Nickells v. Atherabong*, 10 Q. B., 944.

⁵ *Grimman v. Legge*, 8 B. & C., 324.

⁶ *Lyon v. Reed*, 13 M. & W., 285.

⁷ *Danodar v. Madharasing*, B. P. J. (1888), 390.

⁸ *Obhaya Charan v. Kailash Chunder*, I. L. R., 14 Cal., 751.

⁹ *Prem Sukh Das v. Bhupia*, I. L. R., 2 All., 517, F. B.

¹⁰ *Baynton v. Morgan*, 21 Q. B. D., 161; *Holme v. Brunskill*, 3 Q. B. D., 495 (504).

of part of the land demised, the former tenancy of the remainder of the farm still continues."¹ But in cases where it is so, it does not appear that the lessee is entitled to a proportionate rebate of rent in consequence of the portion surrendered.² Renewal of a lease in respect of a part of the land originally demised, necessarily operates as a surrender of that part.³

An implied surrender, or a surrender by operation of law may arise or be inferred from various circumstances. Thus where the lessee accepts a new lease in substitution of his existing lease, it operates as a surrender thereof by operation of law.⁴ "The reason," says Woodfall, "why such acceptance of a new lease operates as a surrender of the first is, because the lessee, by accepting the new lease, has been party to an act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first."⁵ It is not necessary that in order to operate as a surrender the new lease should be of the same duration as the existing lease. Thus if a lessee for twenty years takes a lease for ten years, the former term would be deemed to be surrendered,⁶ but there would be no surrender if the latter lease were far more than the duration of the original term, and were dependent upon a contingency. Thus "where a lessee for twenty-one years took a lease of the same lands for forty years, to begin immediately after the death of J. S., it was held that this was not any present surrender of the first term, because J. S. might wholly outlive that term, and then there would be no union to work a surrender; and it was considered that in the meantime, the chances being equal, whether he would survive it or not, the first term should not be hurt till that contingency happened; but that if J. S. died within the first term, then what remained of it was surrendered and gone by the taking place of the second."⁷ Acquisition of another interest in the demised property operates as a surrender. Thus acceptance of the custody of a house by the lessee for years, or of rent, or grant of common, to commence within the term have the like effect. But the subsequent grant must not be collateral, but of the thing itself,⁸ and to the lessee and not in trust for another. And before surrender can take effect, the subsequent lease must have been a completed

¹ *Holme v. Brunskill*, 8 Q. B. D., 495 (504); followed in *Baynton v. Morgan*, 21 Q. B. D., 101 (108), cited *supra*.

² *Baynton v. Morgan*, 21 Q. B. D., 101 (104); *Stevenson v. Lambard*, 2 East., 575; but see *Mayor of Swansea v. Thomas*, 10 Q. B. D., 48; cf. *Saroda Soonduree v. Haree Mahomed*, 5 W. R. (Act X), 78.

³ *Earl of Carnarvon v. Villabois*, 13 M. & W. 342; *Morrison v. Chadwick*, 7 C. B.,

266; 6 D. & S., 567.

⁴ *Crowley v. Pitty*, 7 Exch., 819.

⁵ *Lyon v. Read*, 13 M. & W., 285; *Bessell v. Landsberg*, 7 Q. B., 688; *Woodfall, Landlord and Tenant* (16th Ed.), 816, 817.

⁶ *Smith's L. C.* (6th Ed.), 713.

⁷ *Woodfall, Landlord and Tenant* (16th Ed.), 817.

⁸ *Id.*, 317.

transaction, and not merely inchoate.¹ Again, there can be no surrender; if the second lease is void or voidable.²

Surrender by implication may also take place where the tenant relinquishes and the landlord assumes possession of the land. Such surrender may be inferred from the conduct of the parties, as where the tenant leaves the key of the demised premises, and the landlord accepts it and invites offers for re-letting them;³ or where relying upon the lessee's offer to vacate at an earlier date than for which he could give a valid notice to quit, the landlord sells the premises with the lessee's knowledge and assent and with a right to possession from that date, in which cases the lessee is estopped by his conduct from afterwards falling back upon the lease. It was also held in the case that the lessee in having proposed to vacate the demised premises on a certain day must be construed to have accepted a new tenancy determinable on that day, and the effect of which was to work a surrender of the old one by operation of law.⁴ And similarly where the tenant vacated in the middle of the term, and the landlord re-let the premises, it was held that the facts were sufficient to warrant an inference that there had been a surrender of the tenancy.⁵ So again, where the lessee sub-lets his holding, and the landlord accepts him as his tenant, there is a surrender of the original lease by operation of law. And the result is the same where the landlord grants a new lease to a stranger with the assent of the lessee, who gives up possession to the new tenant.⁶ Where two lessees of different plots from two different lessors, mutually exchanged them, and the landlords afterwards assented to the arrangement, it was held that this was sufficient to operate as a surrender by the old tenants of their respective holdings.⁷ When a ryot, without giving any notice, goes away from the land he has occupied and neither cultivates it nor pays rent, the landlord is justified in assuming that he has relinquished it; and the ryot has no right to be reinstated in possession on the ground that he has never formally relinquished the land.⁸ But mere non-occupation and non-cultivation does not *per se* amount to a surrender,⁹ but if in addition he goes away from the land,¹⁰ or takes

¹ *Buteley v. Figueira*, 25 L. J. Q. B., 371.

² *Roe & Earl of Berkeley v. Archbishop of York*, 6 East., 86; 8 R. R., 513.

³ *In re Panther Lead Co.* [1896], 1 Ch., 578; but see *Osaker v. Henderson*, 2 Q. B. D., 575.

⁴ *Fenner v. Blake* [1900], 1 Q. B., 426.

⁵ *Wallis v. Acheson*, 11 Moore, 370.

⁶ *Wallis v. Hands* [1893], 3 Ch., 75. Chitty, J., in this case, however, insisted that unless the old tenant gives up possession to the new tenant at or about the time of the grant, there could not be a valid surrender of the old lease, as otherwise it would practically amount to a repeal of the Statute of Frauds, sec. 3, and of the Statutes 3 and 9 Vic., Ch., 106, which avoid a surrender in

writing, unless made by deed, except in cases where the lease itself might have been created without a deed. This distinction, however, would not apply to leases in India.

⁷ Woodfall, Landlord and Tenant (16th Ed.), 322.

⁸ *Ram Churn v. Gora Chand*, 24 W. R., 344; *Chandermanee v. Sunthoo Chunder*, W. R. (1864), 270; *Shoodan v. Ram Churn*, 2 W. R., 137.

⁹ *Balaji Sitaram v. Bhikaji Soyari*, 1. L. R., 8 Bom., 164; *Fooladeh v. Krishnaji*, ib., 100; *Rulha Muthub v. Kulce Churn*, 18 W. R., 41.

¹⁰ *Maneeraddera v. Mohamed Ali*, 6 W. R., 67.

lease of some other land, or has ceased to pay rent for some years as for four¹ or five years,² the landlord would be justified in re-entering on the land as if the tenant had surrendered. But in such cases if the landlord regards the lease as still subsisting and consequently sues the lessee for rent, he cannot plead that the landlord ought to have assumed that he had surrendered.³

When the house had fallen to the ground and the land had been deserted by the tenant, the landlord was held justified in taking possession of the land as abandoned.⁴ There is nothing against a surrender being made subject to conditions, which, if unfulfilled, the surrenderor may reclaim the property surrendered. "A lessee," says Woodfall, "may surrender upon condition, and if the condition be broken, the particular estate is revealed; therefore, if a lessee for years surrender his whole term to the original lessor upon condition, he may, upon non-performance of the condition, re-enter and revive the term."⁵ There cannot be a surrender to take place *in futuro*. If anything is done by the tenant before the transaction would amount to no more than a covenant or agreement to surrender, since there can be no surrender by mere force of the contract.⁶ An insufficient notice to quit, therefore, even though accepted by the landlord, would not in itself amount to a surrender, if it is to operate *in futuro*. One joint tenant is competent to surrender for the other joint-tenants as well as for himself, if it is for the benefit of them all. But if the benefit is doubtful, it will not bind them.⁷ Joint-tenants may, however, be also bound by estoppel, as where one of two joint-tenants lies by and allows the other to act for him and tacitly ratifies his acts.

It should be noted that no surrender, whether express or implied, can be made without the assent of the landlord. As Erle, C. J., said: "Anything which amounts to an agreement, on the part of the tenant to abandon, and on the part of the landlord to resume possession of the premises, amounts to a surrender by operation of law."⁸

308. The effect of a surrender on under-tenures must be left

Effect on under-tenures. to be discussed elsewhere.⁹ On the lessee himself the effect is to dissolve his relation as such with the landlord, and neither he, nor any one under him, can therefore claim to regain possession of the property after surrender.¹⁰

¹ *Mully Sonur v. Gundur Soonur*, 20 W. R., 129.

² *Nuddenr Chand v. Mothoosoodum*, 7 W. R., 158.

³ *Venkatesh v. Krishnaji*, 1 L. R., 8 Bom., 160; *Balaji Sitaram v. Bhikaji Soyare*, 1 L. R., 8 Bom., 164.

⁴ *Badam v. Michel*, 1 Agra, 266; *Bunnoo Bebes v. Shoo Buns*, 3 Agra (Rev.), 9.

⁵ Woodfall, *Landlord and Tenant* (16th Ed.), 315; Co. Lit., 218d.

⁶ *Conpland v. Maynard*, 12 East., 184; *Forquet v. Moore*, 7 Exch., 870.

⁷ *Right v. Cuthell*, 5 East., 491 (498); 7 R. R., 752.

⁸ *Piens v. Popplewell*, 81 L. J. G. P., 286.

⁹ Sec. 118, post.

¹⁰ *Baidonath v. Anpurna Dabse*, 10 C. L. R., 15; *Chundermonee v. Sunishoo Chunder*, W. R. (1864), 270; *Shoodan v. Ram Churn*, 2 W. R., 187.

809. Surrender or sale.—A surrender or relinquishment which does not require to be in writing should be distinguished from a sale or reconveyance. Of surrender, it may generally be said that the proposal in the first place emanates from the lessee, and the object of the surrenderor is usually to resign his interest for which he does not receive a price. But a surrender may often approximately approach an exchange, as where the lessee exchanges his land for another. If the object of the surrender is to receive its value in cash, the transaction is unquestionably one of sale and not surrender. In many cases much must depend upon the intention of the parties and the purpose of the transaction.

810. Forfeiture is resumption of the grant as a penalty for breach of certain conditions by the lessee, or as a consequence of his denial of his landlord's title. On forfeiture, the lessor has the same right of ejectment as he would have had if the lessee's term had been otherwise determined. Forfeiture can only be incurred by the lessee (1) in case the lessee breaks an *express* condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) the lessee denies his landlord's title, by either claiming adversely himself, or by setting up a title in a third person.

The proviso for re-entry in a lease must be *express*, and it must be distinctly stipulated that on breach of the condition the lessor shall be entitled to re-enter. Thus it may be provided in the lease that the lessor shall have the right of re-entry on the premises upon breach of any of the covenants,¹ or on breach of only certain specified covenants, as that if the rent should be unpaid for ten days,² or that if the lessee should fail to make repair or to perform other specified services, or should he underlet or neglect to cultivate the land without reasonable excuse³—in all of which cases the lessor has the option of determining a lease upon a breach made. A tenant has no right to plant new trees upon the land of his landlord, and if he plants them against an express covenant entered into by him he is liable to ejectment,⁴ unless he can shew that according to the custom of the country he was entitled to plant them.⁵ But the mere planting of trees upon his holding by the tenant would not expose him to the penalty of forfeiture unless it has materially affected the character of the holding, and this is the sole criterion by which even express covenants on this behalf should be judged. A *patta* containing a clause prohibiting the planting of any new trees whatever would be an improper

¹ *Rede v. Farr*, 6 M. & S., 131; 13 R. R., 329.

² *Kavanagh v. Gudge*, 7 M. & G., 316; see also *Umritsnath v. Koonj Behary*, W. R. F. B., 34; *Cuthenho v. Souza*, 1 M. H. O. R., 15; *Kristo Nath v. Brown*, I. L. R., 14 Cal., 176.

³ *Golam Ali v. Bhoesai*, 25 W. R., 227.

⁴ *Jewa Ram v. Fulteh Singh*, Agra F. B., 125; Ed. 1874, 94; *Azurrodeen v. Mohur Singh*, 2 Agra, 165; *Koorra v. Dick*, 3 N.-W. P.

H. C. B., 322; *Lakshmana v. Ramchandra*, I. L. R., 10 Mad., 351.

⁵ *Jhona Singh v. Neer Beyum*, 2 Agra (Pt. II), 188; *Kausalia v. Gulab*, A. W. N. (1899), 72; *Imdad Khan v. Bhagirath*, I. L. R., 10 All., 189; *Nagar Chandra v. Ram Lal*, I. L. R., 22 Cal., 742; *Ruttonjee v. The Collector of Thana*, 11 M. I. A., 295.

patta and could not be enforced.¹ Thus where a tenant of irrigable land, converts it into a cocoanut garden, it was held that the act was not sufficient to occasion forfeiture.² Where the tenant is liable to ejectment for having planted trees, he would be ejected from the entire holding, notwithstanding that he may have planted trees on only a portion of the land.³ Where, however, the lease is held by several persons, alienation of a portion of the property by one of several co-sharers would not work a forfeiture of the whole tenure.⁴ But in an action of ejectment for planting trees the penalty of forfeiture is not to be enforced as a matter of strict right, for the Court may in its discretion make a decree for removal of the trees.⁵ Again, the tenant has no right to change the course of husbandry as by diverting the land to purposes other than those for which it was let. If, therefore, the lessor has expressly provided against such diversion, and there is the provision for re-entry, the lessee is liable to be ejected.⁶ But unless there is clear proviso for re-entry the lessor would not be entitled to eject the lessee, although in a suit properly framed, he may be able to obtain a decree for injunction or compensation. Indeed, the penalty of forfeiture is one against which the Courts always strongly lean against,⁷ and it is certain that they would refuse it where the clause in regard to re-entry is either indefinite, ambiguous or penal.⁸ Thus, for example, where in a lease the lessor had provided "the fulfilment of the following conditions to be the means of his continuing to be lessee," these being to pay the rent annually and "in case the rent is not so paid, all his (the lessee's) property moveable and immoveable shall be sold, and the proceeds of such sale shall be deposited in the Government treasury towards satisfying any arrears; and secondly, that the lessee shall not allow, without the lessor's permission, any one to plant trees, dig tanks, or sink wells, neither shall he himself do such things;" in the end the lease provided that "as long as the lessee or his heirs shall continue to pay the rent annually, instalment by instalment, the lease shall remain in force, but if even one instalment falls into arrear the lease shall become null and void, and shall be cancelled." The lessee having broken both the above conditions, it was held with reference to the first condition that mere irregularity and unpunctuality in the payment of the instalments were not breaches of the condition of the lease involving forfeiture, and with

¹ *Krishna Doss v. Venkatappa*, 9 M. L. J. R., 146.

² *Venkayya v. Ramasami*, 1. L. R., 22 Mad., 89.

³ *Bholai v. Raja of Bansi*, 1. L. R., 4 All., 174.

⁴ *Dassorath v. Rama Krishna*, 1. L. R., 9 Cal., 596.

⁵ *Koora v. Dick*, 3 N.-W. P. H. C. R., 523; *Shao Churn v. Bussunt Singh*, ib., 282, F. B.; *Abialah Rai v. Salim Ahmed Khan*, 1. L. R., 2 All., 457.

⁶ *Lakshmana v. Ram Chandra*, 1. L. R., 10 Mad., 251; and see cases under sec. 108 (O), ante; *Amir Singh v. Moarum Ali*, 7 N.-W. P. H. C. R., 58 (garden brought under cultivation).

⁷ *Sreemutty Abulleya v. Bhyrub Chunder*, 25 W. R., 146.

⁸ *Dos d Windham v. Carew*, 2 Q. B., 517; *Ram Narsingh v. Dwarakanath*, 23 W. R., 10; Anonymous, 1 Ind. Jur. (O. S.), 190; *Chidambara v. Manikka*, 1 M. H. C. R., 68.

reference to the second condition, the High Court held that the condition was merely prohibitory, and there being no provision for re-entry, the lessee could not be ejected.¹ Similarly in another case where the stipulation was against sub-letting, and the lease contained no right of re-entry, it was held that from the mere prohibition the right of re-entry in case of a breach of that condition could not be inferred, and that therefore he could not be evicted.² A mere covenant on the part of the lessee not to alienate, unaccompanied by any clause for re-entry upon breach of the covenant, is not a condition upon which the lessor can in any case sue for ejectment.³ And into the same category fall covenants which are vague and indefinite. Thus, in a case where an agreement contained the following clause: "If you (lessee) fail to pay the amount . . . within the limited time, you shall have no right to the land. You are further required to act rightly and in conformity with the deed of rent granted by you on this date; and in the event of your failing so to do, this agreement shall be null and void," it was held that the clause of forfeiture was so vaguely worded as to have the appearance of a mere threat, such as in equity, in the absence of specific mention of the nature of the failure which was to bring down the penalty of forfeiture, ought not to be enforced.⁴ But where it was a condition in the *kabuliat* that the tenants' holding would be forfeited if he neglected to cultivate the land without reasonable excuse, it was held that the condition could not be regarded as a mere *ad terrorem* clause, since if it came to the selling up of the tenure for default, it made a great difference to the landlord whether the land had been properly cultivated or not.⁵ A stipulation however precise, if it appears to be penal, ought to be relieved against. Thus where the lessee agrees: "And (I have also agreed) that on failure to pay the said quantity of paddy the *kanam* amount of 550 fanams shall be received by me, and the land restored," the object being really to secure regular payments of the rent, the clause as to forfeiture apart from the provisions of the Act,⁶ could not be literally enforced.⁷

Again, a stipulation against alienation to be enforceable in law must be for the benefit of the lessor. Hence, a general

¹ *Ablakh Rai v. Salim Ahmad*, 1 L. R., 2 All., 437. (The *placitum* of this case is incorrect, see p. 442.)

² *Gordon, Stuart & Co. v. Taylor and others*, W. R. (F. B.), 9; see also *Joy Kishen v. Raj Kishen*, 5 W. R., 147; *Dassorathy v. Rama Krishna*, 1 L. R., 9 Cal., 526; *Ruhmoonissa v. Soopun Jan*, 18 W. R., 244; *contra* in England in *Eastern Telegraph Co., Ltd. v. Dent and others* [1899], 1 Q. B., 885.

³ *Mohana v. Sheth Sadodin*, 7 B. H. C. R. (A. C.), 69; *Narayan v. Ali Saiba*, 1 L. R., 18 Bom., 608; *Madar Sahab v. Sannadawa*, 1 L. R., 21 Bom., 195.

⁴ *Chidambara v. Manikka*, 1 M. H. C. R., 68.

⁵ *Golam Ali v. Bhoosal*, 25 W. R., 237; but see *Dinabhandu v. Lokanadhasami*, 1 L. R., 6 Mad., 322.

⁶ Sec. 114, *post*; *Vaguram v. Rangayyan-gar*, 1 L. R., 15 Mad., 125.

⁷ *Kottal Uppi v. Edavalath*, 6 M. H. C. R., 268; *Subbarayya v. Krishna*, 1 L. R., 6 Mad., 169; *Narayana v. Narayana*, *ib.*, 377; *Vaguram v. Rangayyan-gar*, 1 L. R., 15 Mad., 125; *Mahomed Amer v. Peryag Singh*, 1 L. R., 7 Cal., 566.

stipulation absolutely restraining the lessee from transferring his holding would be bad under the provisions of sec. 10.¹

Where the covenant is clear and unequivocal the lessee cannot get out of it by shewing that the breach was due to his forgetfulness of *bona fide* belief that the covenant was unimportant and not intended to be literally construed.²

The clause as to forfeiture applies equally to a permanent lease,³ in which the owner only carves a subordinate interest out of his own and does not annihilate his own interest. "By the lease he excludes himself during its currency from that right, but the determination of the lease is a removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease."⁴ But it has no application when the condition is not broken voluntarily by the lessee, as where the land is sold against his will by the act of a Court, in execution of a decree obtained against him.⁵ But the lessor may provide for even such alienation, as by stipulating "you are not to let it be sold, or attached and sold in satisfaction of judgment-debts: if you do let it I shall take away the land, and give it to others for cultivation,"⁶ or that "if the lessee should incur any debt on which any judgment should be signed, entered up or given against him, and on which any writ of *fiери facias*, or other writ of execution, should be issued, &c.,"⁷ in which case upon the premises being taken in execution the term would be determined and forfeited to the lessor. In all cases where forfeiture is stipulated to be the penalty for alienation, the proviso for re-entry cannot be enforced until the transfer is complete. Thus where a tenant with a right to cultivate land on paying the assessment but without any right to sell or mortgage it, had sold it to another, but there was no change of possession, nor mutation of name, nor refusal to pay rent, nor distinct repudiation of the landlord's title as superior holder, it was held that the latter was not entitled to a forfeiture, but only to a declaration that he was not bound by the alienation and that his rights remained the same as if such alienation had not occurred.⁸ In this respect the relation between the zemindar and ryot in India is not the same as that between the English landlord and tenant.⁹

The proviso for re-entry is not generally restricted, as may be supposed,¹⁰ to the breach of only positive covenants, for a proviso expressed to operate in case of the breach of negative covenants

¹ See sec. 10, ante; *Nilmadhab v. Narutani*, I. L. R., 17 Cal., 828.

² *Eastern Telegraph Co., Ltd. v. Dent and others* [1899], 1 Q. B., 835.

³ *Subbarayya v. Krishna*, I. L. R., 6 Mad., 159; *Kally Das v. Monmohini*, I. L. R., 21 Cal., 440.

⁴ *Per Jenkins, J.*, in *Kally Das v. Monmohini*, I. L. R., 21 Cal., 440 (447).

⁵ *Nil Madhab v. Narattam*, I. L. R., 17 Cal., 826; *Tamaya v. Jimapa*, I. L. R., 7 Bom., 262; *Subbarayya v. Krishna*, I. L. R., 6

Mad., 159.

⁶ *Vyankatraya v. Shicram Bhat*, I. L. R., 7 Bom., 256.

⁷ *Dwies v. Eytton*, 7 Bing., 154; *Re v. Topping*, 39 R. R., 644.

⁸ *Nagar Das v. Hari*, B. P. J. (1891), 183.

⁹ *Id.*

¹⁰ Thus e.g. in *Hyde v. Warden*, 3 Ex. D., 72 (81); *West v. Dobbs*, L. R., 5 Q. B., 460; *Doe & Palk v. Mitchell*, 1 B. & Ad., 715; cited and reflected upon in *Wadhams v. Postmaster-General*, L. R., 6 Q. B., 644.

would be equally effective. In other words, forfeiture may be incurred for non-performance as well as non-observance of the covenants.¹ As observed by Blackburn, J., "where the proviso for re-entry uses apt words I think the power of re-entry may be just as well reserved for breaking a negative covenant as for not performing a positive covenant."²

811. A forfeiture incurred under this section may in certain cases be waived,³ and where it is incurred for non-payment of rent, the Court may relieve the lessee against it.⁴ The

Waiver of forfeiture.

subject will be found fully discussed in commentaries on the three following sections.

812. Apart from the breach of an express condition, forfeiture may also be incurred "in case the lessee renounces his character as such by setting up a title in a third person or by

(g) (2) Denial of landlord's title.

claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease. This rule is founded upon the principle that a lessee having once claimed against the lessor is thereafter estopped from claiming under him. The lessee derives his title from the lessor and he cannot repudiate him. He cannot claim against and under the same man, he cannot approbate and reprobate,—or as it is familiarly expressed, he cannot blow hot and cold.⁵ And his obligation to respect the title of the lessor from whom he holds is so far recognized, that if he deny the lessor's title even by parol declarations, the landlord has the option of determining the lease.⁶ But in England, a mere denial by parol of the landlord's title does not occasion forfeiture of a lease for a term certain,⁷ but it does in the case of a tenure from year to year.⁸ The tenant may in the language of the clause "renounce" his character in many ways. He may, for example, refuse to pay rent to the lessor maintaining him not entitled to receive it. Thus where in answer to the landlord's demand the lessee replied: "I have no rent for you, because A has ordered me to pay none," it was held that there was a denial of the landlord's title.⁹ But where after the death of the original lessor, the tenant did not directly deny the claimant's title, but refused to pay rent "until he knew who was the right owner," and it appeared that the succession was at the time disputed, it was held that this did not amount to a denial of the lessor's title.¹⁰ The denial by the lessee must be false, otherwise there can be no forfeiture. And where the title itself is not denied, but the tenant

¹ *Wadham v. Postmaster-General*, L. R., 6 Q. B. 644 (648).

² *Ib.*, 648.

³ See sec. 112, 113, post.

⁴ See sec. 114, post.

⁵ *Kally Dass v. Monmohini*, I. L. R., 24 Cal., 440 (448); *Ananda Chandra v. Abraham*, 4 O. W. N., 42.

⁶ *Suiyabham v. Krishna Chunder*, I. L. R., 6 Cal., 55 (58); *Vishnu Chintaman v. Balaji*, I. L. R., 12 Bom., 352 (356).

⁷ *Doe d Graves v. Wells*, 10 A. & E., 127.

⁸ *Vivian v. Moat*, 16 Ch. D., 730.

⁹ *Doe d Whitehead v. Pittman*, 2 N. & M., 673.

¹⁰ *Jones v. Mills*, 10 C. B. (N. S.), 788.

sets up a permanent tenancy,¹ or tenancy at a fixed rent, there can be no forfeiture. But in England it has been held in a case, dissented from in this country,² that the tenant's claim to hold at a customary rent is sufficient renunciation or disclaimer of the landlord's title upon which the latter was entitled to re-enter without even giving a notice to quit.³ It was said in the case that, since every landlord has a right to raise the rent, the lessee's objection questioning his power to raise it was so far in derogation of his right as practically to amount to a denial of his status as the landlord. Adverting to this case Field, J., in *Kali Kishen v. Golam Ali* has held the principle to be inapplicable to tenures in this country. Says he: "We think that the ground of this decision rests mainly upon the relation of landlord and tenant, as it exists in England, where such relation depends upon contract, and that the principle of this case is not applicable to this country, where a different state of things prevails. In this country there are numerous tenures the rent of which cannot be raised, and the denial of the landlord's right to raise the rent is not necessarily a renunciation or disclaimer of his title as landlord."⁴ And this view has now received the consensus of all the other High Courts.⁵ The tenant is again entitled to plead that although he originally held under the landlord his title has since determined, as for example, by a sale to him by the landlord, in which case the tenant no longer holds under a title derived from him.⁶

It is often a question of considerable difficulty whether what has taken place is sufficient in law to constitute a denial of the landlord's title. The question is in each case, no doubt, a question of fact dependent upon the language used, and the intention of the disclaiming party. If the language used is such as would if reasonably construed amount to a disclaimer, the Courts will not hesitate to infer that the landlord's title was denied. But in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it.⁷

¹ *Krishna v. Ladu*, B. P. J. (1892), 292; *Kali Krishna Tagore v. Golam Ali*, I. L. R., 13 Cal., 243; but see contra in *Baba v. Vishwanath*, I. L. R., 8 Bom., 328; and compare *Purshotam v. Dattatraya*, I. L. R., 8 Bom., 669.

² *Kali Krishna Tagore v. Golam Ali*, I. L. R., 13 Cal., 243; but the case was apparently followed in *Baba v. Vishwanath*, I. L. R., 8 Bom., 328.

³ *Vivian v. Mont*, 16 Ch. D., 780.

⁴ *Kali Kishen v. Golam Ali*, I. L. R., 13 Cal., 3 (6); *Kali Kishen v. Golam Ali*, ib., 248 (per Petharam, C. J., and Ghose, J.); *Baba v. Vishwanath*, I. L. R., 8 Bom., 328; which appears to have followed *Vivian v. Mont*, 16 Ch. D., 780, dissented from.

⁵ *Purshotam v. Dattatraya*, I. L. R., 10 Bom., 669; *Ramchandra v. Dowlaji*, B. P. J. (1890), 10; *Hari v. Ramabai*, ib., 25; *Vithu v. Dhondi*, I. L. R., 15 Bom., 407; *Lalu Gogul v. Bai Molan*, I. L. R., 17 Bom., 631; *Dodhu v. Madhabrao*, I. L. R., 18 Bom., 110; *Venkaji v. Lakshman*, I. L. R., 20 Bom., 354, F. B.; *Abdulla v. Subbarayyar*, I. L. R., 2 Mad., 346; *Subba v. Nagappa*, I. L. R., 12 Mad., 253; *Unkamma v. Vaituntin*, I. L. R., 17 Mad., 218; *Haidri v. Nathu*, I. L. R., 17 All., 45.

⁶ *Nadu v. Nilkanth*, I. L. R., 22 Bom., 428; *Beni Pershad v. Dudhnath*, I. L. R., 27 Cal., 156 (166), P. C.

⁷ Per Baron Parke in *Doe v. Stanion*, 1 M. & W., 695 (709).

813. Denial must be before suit.—It is a settled rule in England that where a disclaimer is relied on, it must appear to have been made before the suit for ejectment.¹ And similarly it has been held by all the High Courts in India that a disclaimer by the lessee in the pleadings cannot relate back to the institution of the suit and thereby give the lessor a cause of action which he did not otherwise possess.² As has been observed by Mitter, J.: "The plaintiffs' cause of action must be based on something that accrued antecedent to the suit. The fact that the defendants in their written statement denied their tenancy under the plaintiffs would not give the plaintiffs a cause of action upon which to found their suit."³ The contrary view appears to have been suggested in *Bala v. Vishwanath*,⁴ but later cases have distinguished this case, and have uniformly adhered to the view above expounded.

Of course as soon as the lessee repudiates his landlord, the latter becomes entitled to eject him as a trespasser. He need not give him any notice to quit. Thus in *Unhamma v. Vaikunta*,⁵ it was observed: "Nor is there any doubt that the tenant forfeits this right to notice by denying the landlord's title prior to the suit. It is also settled law that the denial of title for the first time in the suit does not disentitle the tenant to notice, for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action; and subsequent denial of title, even if false, does not release the landlord from proving his case or amount to a waiver by the defendant of his right to notice."⁶ Of course a denial of the landlord's title in any suit other than the suit for ejectment on that ground, would give a good cause of action for the landlord's disability to obtain relief on account of the defendant's denial after the institution of his suit is not due to any privilege attaching to pleadings, but to the fact that the Court cannot afford relief to the plaintiff for anything occurring subsequently to the institution of the suit.⁷

A denial made by one co-sharer if shewn to have been made on behalf of all the tenants, would have the same effect as if all the co-sharers had jointly repudiated the landlord.⁸

814. Denial under other acts.—Before the passing of the Bengal Tenancy Act,⁹ it was held by the Calcutta High Court¹⁰

¹ Woodfall, *Landlord and Tenant* (16th Ed.), 889.

² *Gopal Rao v. Kishore Kalidas*, I. L. R., 9 Bom., 527; *Vithu v. Dhondi*, I. L. R., 15 Bom., 407 (412); *Dodhu v. Madhabrao*, I. L. R., 18 Bom., 110; *Paidal v. Parakal*, 1 M. H. C. R., 13; *Abdulla v. Subbarayyar*, I. L. R., 2 Mad., 347; *Subba Pai v. Nagappa*, I. L. R., 12 Mad., 353; *Madaran v. Athi Nan-giyar*, I. L. R., 15 Mad., 123; *Unhamma v. Vaikunta*, I. L. R., 17 Mad., 218; *Ali Husain v. Ali Baksh*, 9 A. W. N., 176; *Haidiri Begam v. Nathu*, I. L. R., 17 All., 45.

³ *Pran Nath v. Madhu Khulu*, I. L. R.,

13 Cal., 96 (98).

⁴ I. L. R., 8 Bom., 228.

⁵ I. L. R., 17 Mad., 218.

⁶ *Per Muttusami Ayyar and Best, JJ.*, in *Unhamma v. Vaikunta*, I. L. R., 17 Mad., 218; see also *Haidri Begam v. Nathu*, I. L. R., 17 All., 45.

⁷ *Chunder Chattopadhyaya v. Shama Churn*, I. L. R., 10 Cal., 41.

⁸ *Ib.*

⁹ Act VIII of 1885.

¹⁰ *Butyabham v. Krishna Chunder*, I. L. R., 6 Cal., 55; *Ishan Chunder v. Shama Churn*, I. L. R., 10 Cal., 41.

that a denial by a tenant of his landlord's title created a forfeiture, but since the passing of the Act it has been held that inasmuch as its sec. 178 whilst enumerating other grounds for eviction does not include a forfeiture by disclaimer among them, it must be presumed that it was expressly excluded by it.¹ It has been accordingly held that in all cases to which the Bengal Tenancy Act applies there can no longer be any eviction on the ground of forfeiture incurred by denying the title of the landlord. In a parallel case, this view has been impugned by a Full Bench of the Bombay High Court which has held that the landlord's right of forfeiture arising from denial of his title is no part of the contract of tenancy, but is a right which the law implies in all cases from the relationship of landlord and tenant. If, therefore, the Legislature had intended to exclude the right of forfeiture, there would have been express provision to that effect.²

815. Incidents of forfeiture.—It has been held in Madras that the consideration paid for a lease is exhausted by the grant of the lease, and a tenant's forfeiture of the lease cannot in the absence of a provision to that effect operate so as to convert the original consideration into a debt which must be paid before the forfeiture can be enforced.³ On the other hand if the lessee has covenanted to have the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left.⁴

816. Limitation.—Where under the terms of a lease, an alienation by the lessee works a forfeiture of the tenure, a suit to eject the tenant must be brought within twelve years under Article 143 of Sched. II of the Limitation Act.⁵ But the landlord is not bound in every case of disclaimer to eject the tenant. It is open to him to either enforce the penalty of forfeiture or waive it, and if he elects to waive it, the tenant cannot on that account claim to hold adversely to the landlord. "The landlord is not bound," says Shephard, J., "to insist on a forfeiture when the occasion arises, and unless he elects to do so, the tenancy remains unaffected. A disobedience by the tenant known to the landlord and accompanied by payment of rent to a third party, does not, at any rate as long as the term of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy-at-will such conduct might afford evidence of the determination of the tenancy."⁶ But if the tenant not only disclaims the landlord, but

¹ *Debiruddi v. Abdur Rahim*, I. L. R., 17 Cal., 196; *Dhora Khatri v. Ram Jeevan*, I. L. R., 20 Cal., 101; cf. *Kabli Sardar v. Chunder Nath*, ib., 590.

² *Venkaji v. Lakshman*, I. L. R., 20 Bom., 854, F. B. (a case under sec. 84 of the Bombay Land Revenue Code, Bombay Act V of 1879).

³ *Kammaran v. Chindan*, I. L. R., 18 Mad., 32.

⁴ *Sarafali v. Subbaya*, I. L. R., 20 Bom., 489; following *Joyner v. Weeks* [1891], 2 Q. B., 31.

⁵ Act XIV of 1877; *Madavan v. Athi Nangiyar*, I. L. R., 15 Mad., 123.

⁶ *Ilappan v. Manavikrama*, I. L. R., 21 Mad., 158 (160); *Doed Graves v. Wells*, 10 A. & E., 427 (434) followed.

openly and continuously disavows him so as to preclude all doubt as to the character of the claim set up or want of knowledge on the part of the owner, there can be no doubt but that limitation would then begin to run from that date."¹ This view of the Madras High Court coincides with that taken by the High Court at Calcutta,² but is opposed to the view maintained in Bombay where limitation has been held to operate from the date of denial of the landlord's title.³

817. Under the last clause a lease may be determined by a

(b) **By notice.** notice to quit given by the lessor, or of intention to quit given by the lessee. The

clause has no reference to leases given for a definite term, which of course cannot be put an end to before expiration of the stipulated period except under circumstances already discussed.

A notice required to be given under the clause must conform as far as possible to the provisions of sec. 106.⁴ One co-sharer landlord cannot give a valid notice unless he is empowered to do so by the other co-sharers.⁵ But if all the co-sharers once serve a joint notice to quit, the fact that one of them subsequently withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.⁶ Where notice to quit should have been but has not been given, an objection on the ground of want of notice can be taken for the first time even in second appeal.⁷

112. A forfeiture under section one hundred and

Waiver of forfeiture. eleven, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

¹ *Ittappan v. Manavikrama*, I. L. R., 31 Mad., 158 (168); see to the same effect *Ternchurn v. Sanguvian*, I. L. R., 4 Mad., 118; and cf. *Denomoney v. Dooryapershad*, 12 B. L. R., 274 (F. B.).

² *Rungolall v. Abdool Guffoor*, I. L. R., 4 Cal., 814.

³ *Gopalrao v. Mahadevrao*, I. L. R., 21 Bom., 894; *Maldain Saiba v. Nagapa*, I. L.

R., 7 Bom., 98.

⁴ *Balaji v. Gopal*, I. L. R., 3 Bom., 23; *Huladhor v. Gooroodas*, I. L. R., 7 Cal., 414; *Reasut Hussein v. Chorwar Singh*, ib., 470.

⁵ *Dwarka Nath v. Kali Chunder*, I. L. R., 18 Cal., 75.

⁶ *Krishna v. Ladu*, B. P. J. (1893), 292.

⁷ *Ebrahim v. Curetjee*, I. L. R., 11 Bom., 514.

318. Analogous law.—This section has been enacted in accordance with the principle of the English cases, and the equitable rule of law now considerably modified both as to principle and procedure by the English Conveyancing Acts of 1881¹ and 1892,² by which forfeiture is no longer enforceable in England “unless and until the lessor serves on the lessee a notice³ specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.”⁴ And “where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor’s action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court having regard to the proceedings and conduct of the parties under the foregoing provisions of this section,⁵ and to all other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the grant of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.”⁶ The provisions of this section are however not applicable “to a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee’s interest.”⁷ The amending Act of 1892⁸ was enacted for the special protection of sub-lessees which will be found discussed under sec. 115.

319. Before the Conveyancing Act, there was practically no relief against forfeiture except in the case of surprise or accident. The Conveyancing Act in England, and the Transfer of Property Act in this country, may therefore be said to have for the first time placed the relief against forfeiture upon its present footing. From the above citation, however, it will be apparent that the law of the two countries is not in all respects parallel. The principle of the two enactments is no doubt similar, but the procedure and the powers of the Courts in England are different and more extensive, and it has been held in *Barrow v. Isaac*⁹ that the sections in the statute is by no means exhaustive and does not exclude the relief which may still be given on general equitable grounds.

¹ Sec. 14 (1), 44 & 45 Vic., c. 41 (which came into force on the 31st December 1881).

² Sec. 5, 55 & 56 Vic., c. 18.

³ The notice must be in writing and may be sent to the lessee by post or otherwise delivered to him. Sec. 67, Conveyancing Act, 1881; cf. sec. 102, ante.

⁴ Sec. 14 (1), Conveyancing Act, 1881.

⁵ Refers to sec. 14 (1), cited above.

⁶ Sec. 14 (2), Conveyancing Act, 1881.

⁷ *Ib.* (5) (4).

⁸ Sec. 4, 55 & 56 Vic., c. 18.

⁹ [1891], 1 Q. B., 417.

820. Principle.—Under this section forfeiture is deemed to be waived if (1) the lessor accepts rent which has become due since the forfeiture, or (2) levies distress for the rent, (3) or by his other conduct he shows an intention to treat the lease as subsisting. In all these cases the lessor is estopped from afterwards enforcing forfeiture. But of course there can be no waiver of what the lessor does not know, and the rule is therefore subject to the proviso which enacts that the lessor shall not be deemed to have waived forfeiture under any of the above circumstances unless “he is aware that the forfeiture has been incurred” at the time he elects to waive it. If, therefore, the lessor accepts rent in ignorance of forfeiture there can be no waiver. And even after he is informed of his right the lessor need not elect at once; for he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons, but when he has once fully elected it is final.¹ Said Lord Blackburn, “The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the person concerned is an election.”²

821. Acts amounting to waiver.—Of the acts which the section enumerates as creating the irrebuttable presumption of waiver, that by acceptance of rent probably furnishes the most examples. If, after the lessor is aware that forfeiture has been incurred, he accepts rent for any period after the forfeiture, he can no longer fall back upon his right to determine the lease by forfeiture, even though (1) **Acceptance of rent.** it may be expressly provided otherwise in the lease.³ A waiver on one occasion of a forfeiture clause for breach of a covenant does not destroy the covenant altogether; for on fresh default being made a fresh right to forfeiture arises.⁴ Acceptance of rent under protest or subject to a qualification is no less an acceptance and would operate as a waiver. As the Privy Council observed in one case: “Where money is paid and received as rent under a

¹ *Clough v. London and N.-W. Ry. Co.*, 7 Ex., 84.

² *Scarf v. Jardine*, 7 H. L. O., 845 (860, 861).

³ *Vishranath v. Yakub*, B. P. J. (1888),

194; *Modhureudan v. Rooke*, I. L. R., 25 Cal., 1, P. O.

⁴ *Buttyappa v. Mahaderamma*, B. P. J. (1892), 858; *Dulli Chand v. Meher Chand*, 8 W. R., 138; *Cutenho v. Souza*, 1 M. H. C. R., 15.

lease, a mere protest that it is accepted conditionally and without prejudice to a right to a prior forfeiture cannot countervail the fact of such receipt."¹ Similarly in another case *Williams, J.*, observed: "It was established as early as *Pennant's case*² that if a lessor after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative, as he had no right at all to take the money unless he took it as rent; he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them."³ A refusal by a landlord to accept rent in kind when it is tendered, on the ground that he is suing for a money-rent, is a waiver of his right to sue his tenant (on the dismissal of his suit for a money-rent) for the value of the rent in kind.⁴

Of course, there can be no waiver unless the lessor has acted with notice or actual knowledge of the forfeiture.⁵

822. English law.—By clause 8 of the English Conveyancing Act, it is expressly provided that the Act shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.⁶

The law there now in force is that enacted by the Landlord and Tenant Act, 1730,⁷ substantially re-enacted by sec. 210 of the Common Law Procedure Act, 1852, by which the tenant is entitled to obtain relief up to within six months after execution,⁸ or from the date of resumption.⁹

823. Again, where the lessor distrains for rent, it operates as a waiver. The power of the landlord to distrain for rent is one of the most ancient and effectual remedies for its recovery.¹⁰ Distress is the taking, without legal process, of the moveable property as a *pledge* for the redressing an injury, the performance of a duty, or the satisfaction of a demand.¹¹ The clause must not be taken to authorize the

¹ *Davenport v. The Queen*, 3 App. Cas., 115; followed in *Kali Krishna Tagore v. Fuzel Ali*, L. L. R., 9 Cal., 843.

² 3 Rep., 640.

³ *Croft v. Lonnely*, 6 H. L. C., 672.

⁴ *Narain Geer v. Gour Surua*, 23 W. R., 368.

⁵ *Nagardae v. Unnu*, B. P. J. (1891), 107.

⁶ Sec. 314 (8), 44 & 45 Vic., c. 41.

⁷ Geo. 2, c. 28.

⁸ See sec. 1 Common Law Procedure Act,

1860, 23 & 24 Vic., c. 126; *Lock v. Pearce* [1893], 2 Ch., 271; *Hare v. Elms* [1891], 1 Q. B., 604.

⁹ *Howard v. Fanshawe* (1895), 2 Ch., 581.

¹⁰ From *L. Distringo*, to bind fast.

¹¹ Wharton's Law Lexicon, "Distress;" Woodfall, Landlord and Tenant (16th Ed.), 442; Blackstone's Commentaries III, 6, in which 'Distress' is defined to be the taking of a personal chattel out of the possession of the wrong doer into the custody of the party injured, to procure a satisfaction for

making of distress where it may be otherwise prohibited, as it declares no more than its effect upon forfeiture. In England, on the other hand, the power of the landlord to levy distress for rent is expressly provided for, and it has been even held that, as soon as goods are distrained and impounded, they come into *custodia legis*, and so long as the distress is not abandoned the mere fact that the lessee was not the owner or in actual possession of the goods does not take them out of the custody of the law. If, then, the true owner removes the goods once distrained he is liable to an action for pound breach.¹

824. Lastly, the section provides for the inference of waiver from "any other act on the part of the lessor

(iii) **Estoppel.**

showing an intention to treat the lease as subsisting." The inference here to be drawn is from the *act* of the lessor, and not from his *intention*, to allow the lease to continue. In other words, if the act of the lessor is such as would lead an ordinary man to infer that the lessor could not have done it without intending to waive the forfeiture, then apart from his real intention which may be otherwise, the lease must be regarded as still undetermined. Where there is a proviso in a lease for forfeiture on assignment without previous license of the lessor, the acceptance by the lessor of rent or insurance premia from the assignee without license, or the entering into an agreement with him in respect of repairs, operates as a waiver of any and all causes of forfeiture of which the lessor is at the time aware. And where such assignments are invalid as being in breach of a covenant not to assign without previous license and to causing forfeiture of the lease, but are valid in all other respects, on waiver of the forfeiture the assignments become operative, and those taking under them become assignees of the lease with the consent of the lessor and are of course subject to all the liabilities of such assignees.² Similarly where notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can be properly calculated. In such a case there may be no waiver of notice, still the effect of the counter-proposal and the negotiations which followed it was to operate as a waiver of the notice pending the period of the negotiations.³ Again the lessor cannot enforce forfeiture, on account of a breach of covenant which is the result of his own wrongful act. Thus in a case where the plaintiff, a zemindar had leased a certain village to the defendants in 1884, and in 1887, he brought a suit to eject the defendants in consequence of certain alleged breaches

the wrong committed. The term is often used in a double sense, to denote the thing taken by the process, as well as the thing itself.

¹ *Jones v. Biernstein* [1899], 1 Q. B., 470.

² *Saraf Ali v. Subrayn*, 1 L. R., 20 Bom., 486a.

³ *Hughes v. Metropolitan Ry. Co.*, 2 App. Cas., 489 (see per Lord Selborne, p. 490).

of covenants in their lease, obtaining a decree in execution of which he dispossessed them on the 23rd September 1887, and obtained possession of the village in suit, and retained it in his possession treating the property as absolutely his own until the 12th April 1888, on which date the defendants having appealed successfully against the decree finally got back into possession, and on the 15th November 1888, the plaintiff again sued to eject the defendants alleging on their part fresh breaches of covenants contained in the lease other than those which formed the subject of the former suit. In this second suit the plaintiff claimed forfeiture of the lease, and payment by the defendants of Rs. 800-12-10 alleging the same to be due on account of payments which ought to have been made, but had not been made, by the defendants to or on behalf of the plaintiff. The defendants, amongst other defences, pleaded an offer by them to the plaintiff of a sum of money which to the best of their knowledge represented the payments to which they were liable under the lease taking into account what the plaintiff should have received during his occupation from the 23rd of September 1887, to the 12th April 1888; it was held that the plaintiff having by his occupation of the leased land which was subsequently held to be wrongful, materially contributed to disabling the defendants from making payments which should have been made by them was not entitled to the benefit of the covenant for forfeiture upon which he sued, and also that the defendants were entitled to have the sums which the plaintiff had realised during his occupation of the land in suit between the 23rd of September 1887 and the 12th of April 1888, taken into account in estimating what was due by them to the plaintiff.¹

Under this clause it must be noted that there can be no waiver by merely lying by and witnessing the breach. The lessor must do some positive act by which the renunciation of his right can be legally inferred.² Thus where in a suit the lessor pleads that he is willing to continue the lease, there would be waiver.³

825. Acceptance of rent after suit.—The acceptance of rent by a landlord, after the institution of a suit to recover possession of the land, is not a waiver of a forfeiture by the tenant under a condition in the lease.⁴ This rule is in accordance with the English cases.⁵ Thus it is observed by Woodfall that “if ejectment be brought on a forfeiture of a lease and after the bringing of such ejectment the landlord accepts rent, or distrain, or set up as a cause of forfeiture a subsequent non-payment of rent, it is no waiver.”⁶ The policy of this rule has been explained in *Grimwood*

¹ *Bakht v. Raja Ram*, 12 A. W. N., 217.

² *Doe d Sheppard v. Allen*, 12 R. R., 597.

³ *Evans v. Davis*, 10 Ch. D., 747.

⁴ *Timmarasa v. Badiya*, 2 B. H. C. R., 66.

⁵ *Doe d Morecroft v. Meux* 1 C. & P., 246;

Jones v. Carter, 15 M. & W., 718; *Grimwood v. Moss*, 7 C. P., 200.

⁶ Woodfall, *Landlord and Tenant* (16th Ed.), 248.

v. *Moss*,¹ in which it was said that since the suit relates to a period anterior to the payment of rent, and any possession given would count from the date of the institution of the suit, no payment of rent subsequent to that date could possibly be treated as a waiver. In the case the breach having taken place prior to the 24th June 1871, and the lessor having sold on the 21st July 1871, Keating, J., said: "The bringing of the action of the 21st July was an unequivocal election to treat the tenant as a trespasser, and the effect of it could not be varied by anything that subsequently took place. Taking the distress afterwards could not affirm the tenancy and waive the breaches prior to the 24th of June in respect of which the election to determine the tenancy had been irrevocably made."²

But although in such a case a lessee cannot plead waiver of forfeiture, Courts of equity have often relieved him from the consequences of forfeiture in accordance with the practice of Courts of equity³ now embodied in sec. 114.

113. A notice given under section one hundred and eleven, clause (b), is waived, with the express or implied consent of the person to whom it is given, by an act on the part of the person giving it showing an intention to treat the lease as subsisting.

Waiver of notice
to quit.

Illustrations.

- (a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.
- (b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

826. Analogous law.—This section too is framed in accordance with the English law, as enunciated in the leading cases of *Blyth v. Dennett*,⁴ and *Tayleur v. Wildin*,⁵ but with one important difference that while under the section the effect of the waiver is to continue the original tenancy under the English law, the waiver has the effect of *determining* the old tenancy and of creating a new one taking effect on the expiration of the old one.⁶ This difference might appear to be technical, but it often leads to important consequences, as where a surety has guaranteed the payment of rent, upon determination of the old tenancy his liability

¹ 7 C. P., 860.

² *Grimewood v. Moss*, 7 C. P., 860 (865).

³ *Timmaris v. Badiga* 2 B. H.C.R., 66 (70).

⁴ 18 C. B., 178 (180).

⁵ 3 Ex., 203.

⁶ *Tayleur v. Wildin*, 3 Ex., 203.

will cease, after the time when the notice waived would have expired.¹

827. Principle.—The last section has dealt with the waiver of forfeiture, and this section now deals with the waiver of notice to quit. To a waiver of forfeiture the lessee cannot be a consenting party. It is entirely at the option of the lessor to waive his right or not. But in a waiver of notice, the lessee is necessarily a consenting party, for after the notice is once given unless the person to whom it is given assents to the waiver, the lessor cannot compel him not to act upon it. As it was observed in a case: "There is this difference between a determination of a tenancy by a notice to quit and a forfeiture; in the former case the tenancy is put end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both; but in the case of a forfeiture the lease is voidable only at the election of the lessor; in the one case the estate continues, though voidable, in the other the tenancy is at an end."² After the lessor has shown by his action an intention of waiver, he cannot afterwards be allowed to retract.³

828. Meaning of words.—"With the consent . . . of the person to whom it is given," i.e., the lessee. A notice may, as a matter of fact, be given to the lessee's agent or other person authorized to act on his behalf, but in the eye of the law such a notice is given to the lessee.

"By an act, &c.:" Mere intention not followed by any overt act is not enough to constitute waiver.

829. Acts evidencing waiver.—Where the lessor receives or distrains for rent accruing after the expiration of a notice to quit, it operates as a waiver of the notice.⁴ But in such a case there would be no waiver if the rent is paid to an unauthorized agent,⁵ or the money has not been paid or received as rent. Hence where a certain sum was paid as rent, but the lessor received it, as a compensation for the lessee's continued unauthorized possession, it was held to be no waiver.⁶ Where the lessor demanded rent accruing after the expiration of his notice, it would not necessarily operate as a waiver, unless it can be shown that the demand was the result of the lessor's intention to treat the lease as subsisting.⁷ But acceptance of rent, however, for even a day beyond the date fixed in the notice for determining the tenancy would unmistakeably have such an operation.⁸

¹ See also sec. 124, Indian Contract Act (Act IX of 1872).

² *Blyth v. Bennett*, 18 C. B., 178 (180).

³ *Per Kekewich, J.*, in *Keith Prowse & Co. v. National Telephone Co.* [1894], 2 Ch., 147 (155).

⁴ III. (a); *Zouch v. Willingale*, 2 R. R., 770.

⁵ *Zouch & Ward v. Willingale*, 1 H. Bl., 311;

2 R. R., 770; *Doe & Ash v. Calvert*, 2 Camp. (N. P. C.), 337, cited in note to *Zouch v. Willingale*, 2 R. R., 770 (772).

⁶ *Doe & Chenny v. Batten*, Cowp., 243.

⁷ *Keith Prowse & Co. v. National Telephone Co.* [1894], 2 Ch., 147.

⁸ III (b); *Doe & Brierly v. Palmer*, 16 East., 58; 14 R. R., 284.

Again, the giving of another notice has as regards the notice previously given the same effect.¹ But the subsequent notice must it appears be of the same character as the first, for if it imposes fresh conditions, it cannot have that operation. Thus, for example, if on expiration of the usual notice the lessor give, the tenant fresh notice to quit at once, or within fourteen days² or on a subsequent day,³ otherwise he would have to pay double rent, it is no waiver of the first notice.

Another instance of an act evidencing waiver is where instead of the six months' notice the lessee gives only three months' notice at the end of which he pays and the lessor receives rent without demur, in which case the latter is deemed to waive the notice to which he would have been otherwise entitled.³

In England the effect of holding over is to create a new tenancy, but from the section it would appear that the lessor's waiver of notice would hardly have that effect here. Neither the lessor nor the lessee can be allowed to retract after they have once waived. They cannot affirm and disaffirm, approbate and reprobate.⁴

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

830. Analogous law.—This section is founded upon the equitable relief which the Courts were even before the Act empowered to give to the defaulting lessee.⁵ In England similar relief is sanctioned by the practice of the Courts of great antiquity; and before the passing of the Landlord and Tenant Act, 1730,⁶

¹ *Doe d Digby v. Steel*, 3 Camp., 115; 13 R. R., 768.

² *Messenger v. Armstrong*, 1 T. R., 53; 1 R. R., 148.

³ *Per Lord Kennon in Shirby v. Newman*, 1 Esp., 266; 5 R. R., 787.

⁴ *Per Kekowich, J., in Keith Prowse & Co. v. National Telephone Co.* [1894], 2 Ch., 147 (155).

⁵ *Timmaree v. Badiya*, 2 B. H. C. R., 66.

⁶ 4 Geo. 2 C., 23.

the lessee was entitled to apply for reinstatement at any time without limit after the passing of the ejectment decree against him. To relieve, however, against the insecurity of title thus created, the Landlord and Tenant Act was passed in 1730 A.D., by which the relief could not be obtained after six months from executions, and the same rule has been re-enacted by sec. 210 of the Common Law Procedure Act, 1852.¹ Of course, the lessee may obtain the relief at any time during the progress of the ejectment proceedings by the payment of rent and costs.² And sec. 1 of the Common Law Procedure Act, 1860,³ now further enables the Court to grant the same relief in a summary manner.

831. Principle.—This section now authorizes the Court in a definite manner to relieve the tenant from the extreme penalty of forfeiture to which the literal enforcement of his contract might have otherwise exposed him. From very early times the Courts have felt bound to relieve the tenants from the consequences of their own acts, but it is the duty of equity to protect the weak and unprovident from being made the victims of their own foolish but inflexible compacts.

832. Early cases.—The equitable principle underlying this section was, as has been pointed out above, recognized in this country long before the Act. Thus where in one case the lessee stipulated. "And (I have also agreed) that on failure to pay the said quantity of paddy the *kanam* amount of 550 *fanams* shall be received by me, and the land restored," it was held that the condition must be regarded as a penalty to secure regular payments of the rent, and as such it was relieved against.⁴ Similarly in another case the Court felt constrained to refuse forfeiture following the doctrine of the English and American Courts of equity.⁵

833. Procedure.—Under the section the lessee is at liberty to tender the rent in arrear, at any time. He may do so before the institution of the lessor's suit for ejectment, in which case he need only pay interest on the money at the stipulated or fair and reasonable rate, for the period in arrear. And if after a valid tender made but refused, the lessor still files a suit for his ejectment, he does so at his own risk, and the Court would then be justified in disallowing him his costs of the suit.⁶ After the institution of the lessor's suit for ejectment, the lessee may still deposit the amount but with the full costs of the suit. But once the decree for ejectment is passed the lessee is not at liberty to obtain relief under the section, and in this respect the rule here differs from the corresponding rule in England. In no case,

¹ 15 & 16 Vic., C. 76.

² *Id.*, secs. 211, 212.

³ 23 & 24 Vic., C. 126.

⁴ *Kottal Uppi v. Edavalath*, 6 M. H. C. R., 258; followed in *Narayana v. Narayana*, 1 L. R., 6 Mad., 327.

⁵ *Timmareva v. Badiya*, 2 B.H. C. R., 70.

⁶ *Krishna Sami v. The Natal Emigration Board*, 1 L. R., 17 Mad., 216; cf. *Croft v. London and County Banking Co.*, 54 L. J. Q. B., 277.

however, can the lessee claim the relief as of right, and while there is no doubt that the Court, which always strongly leans against forfeiture would ordinarily grant the relief unless the lessor shews good cause to the contrary, still it is conceivable that there may be cases when it would be inequitable to decree the relief. It should be observed, that in its power to grant relief the Court is not in any way fettered in its discretion, and the lessee is not required to even allege or shew sufficient or any cause for the non-payment of rent before suit. But since the Court would not, as a matter of course, decree forfeiture, good and sufficient cause must necessarily be shewn before ejectment can be decreed. Such causes may be where the lessee has flagrantly violated his duty to pay rent for a long time, and has attempted to commit waste on hearing of the ejectment suit against him, or where the tenure was held at such a low rent that the withholding of rent could not but be regarded as the result of conspiracy and design; or where the plaintiff has completed negotiations for reletting the property and the lessee has looked on but has made no effort to pay up.¹

The rule being founded upon equity applies to cases whether arising under the Act or not. Thus it has been held to be applicable to cases exempted by sec. 117 from the operation of the Act.² But a grant made by or on behalf of the Crown, is not, it would appear, subject to the same equitable rule.³

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees or relief against the forfeiture is granted under section one hundred and fourteen.

¹ *Howard v. Fanhawe* [1895], 2 Ch., 581; *Stanhope v. Haworth*, 3 T. L. R., 34.

² *Mad.*, 125.

³ *Vaguran v. Rangayyangar*, 1. L. R., 15

³ Sec. 8, Crown Grants Act (Act XV of 1895).

884. Analogous law.—This section closely follows the English law, as enacted by the Landlord and Tenant Act, 1730,¹ which enacts that “the under-lessees shall hold and enjoy the messuages, lands and tenements in the respective under-leases comprised as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, &c., for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease,”² and the same section lays down that if the lease has been surrendered for the purpose of obtaining a new lease, the under-lessee shall continue to be liable to the lessee for the rent, covenants and duties as if the original lease had been still kept on foot and continued.

885. Principle.—After the lessee has sub-let his lease, he cannot derogate from his own grant by surrendering his interest so as to prejudice the under-lessee. If it were otherwise, the lessee might sub-let the demised property and then surrender it, thereby putting his sub-lessee's estate at an end. The rule is intended to prevent collusive surrenders in defraud of the rights of the under-lessees who often acquire them on payment of considerable sums by way of premium, and whose possession would otherwise be totally insecure and dependent upon the will or caprice of the lessee. Where, however, forfeiture has been incurred, the case is different, for by it the lease is determined without any action on the part of the lessee, unless the latter has collusively or fraudulently brought it about, in which case again the interest of the under-lessee remains unaffected. Thus says Mellish, L. J. (in a judgment concurred in by James, L. J., and Baggallay, J. A.):—“It is a rule of law that if there is a lessee and he has created an under-lease, or any other legal interest, if the lease is forfeited, then the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee surrenders he cannot, by his own involuntary act in surrendering, prejudice the estate of the under-lessee, or the person who claims under him. If the question arose between an under-lessee and the landlord, the moment the surrender was produced, and it appeared in Court that there was a surrender of the estate, I have no doubt that a Common Law Court must necessarily hold that the landlord had waived all right to forfeiture by accepting a surrender. It would not be a case decided upon equitable grounds, but it would be a purely legal question, that is to say, although there might have been a right to claim a forfeiture if the landlord had chosen to insist upon it, yet he, *de facto*, not coming in under a forfeiture but under a

¹ Sec. 6, 4 Geo., 2, c. 28.

² *Ib.*

surrender, if he then brought an action of ejectment against the under-lessee, the moment the surrender was produced the action must, in my opinion, fail and the under-lessee would be entitled to keep his estate."¹ Thus then where in consequence of forfeiture the under-lease is imperilled, the question would naturally be, whether there has been really a forfeiture or only a surrender. If the determination of the lease is the consequence of the operation of law or a proceeding *in invitum*, presumably it is a forfeiture unless it can be shown to have been procured by fraud or collusion, in which case the interest of the under-lessee cannot be prejudiced. If on the other hand the landlord entitled to forfeiture, has waived it, and has for a consideration accepted a surrender, the under-lessee cannot forfeit his estate.

836. Meaning of words.—"Surrender, express:" dealt with in sec. 111 (e), or "implied" dealt with in sec. 111 (f). "*Procured by the lessor*:" The word "lessor" is clearly a misprint for "lessee."

837. Effect of (a) surrender on under-lessee.—The reason of the rule relating to the effect of surrender on an under-lease has been already discussed. ("Principle," § 835.) The sub-lessee cannot be affected by any alienation made, or suffered by him as in the execution of a decree against him,² or by abandonment or surrender of his interest.³ And the same principle would apply to holders of all intermediate tenures. Thus in Bengal it was held that the right of landholders of *patni* taluks of the second or lower degrees is not liable to be cancelled by the resignation of the *patnidar* who granted the taluk.⁴ The surrender of a term operates as more than an assignment of the surrenderer's interest in it, and so far as the sub-lessee is concerned, it does not merge into the lessor's interest. Therefore, if the lessee could not eject the sub-lessee, no more can the lessor in virtue of the surrender which confers upon him no higher right.⁵ And the rule is not affected by any notice which the under-lessee may have or receive of the surrender.⁶

The section has of course application to an under-tenure created before the surrender, for after he has parted with his interest, there is none left in him which he could transmit.

It would appear that although on surrender, the sub-lessee steps into the shoes of the lessee, in all other respects his rent is however liable to revision. There can be no doubt that the exception is founded upon reason, for the lessee may have obtained his

¹ *Great Western Railway Co. v. Smith*, 3 Ch. D., 235 (253).

² *Vishnu Atmaram v. Anant Vishnu*, 1 L. R., 14 Bom., 284.

³ *Heralal v. Neelmonce*, 20 W. R., 333; *Judoonath v. Schoene, Kilburn & Co.*, 1 L. R., 9 Cal., 671; *Venkataramania v. Ananda Chetty*, 5 M. H. C. R., 120; *Narayan v. Agastin*, B. P. J. (1887), 287; *Narayan v. Venkati*, B. P. J. (1886), 14.

⁴ *Kowla Kant v. Ram Mohun*, 2 Sel. Rep., 325; cited in *Judoonath v. Schoene, Kilburn & Co.*, 1 L. R., 9 Cal., 671 (677).

⁵ Co. Litt., 338b; *Mellor v. Watkins*, 1 L. R., 9 Q. B., 400; *David v. Rabin* [1893], 1 Ch., 523 (per Lindley, L. J., p. 533); *Vinayal v. Mainat*, 1 L. R., 19 Bom., 133.

⁶ *Mellor v. Watkins*, 1 L. R., 9 Q. B., 400 (per Cockburn, C. J., p. 404).

lease for various reasons, upon exceptionally favourable terms. which the landlord cannot be expected to concede to another. After surrender the under-tenant attorns and becomes the tenant of the landlord, and their relation would thenceforward be that of lessee and lessor. But if the surrender has been made for the purpose of renewing the lease there is of course the lessee still to whom the under-lessee would continue to be in all respects liable in the same way as if the new lease had in fact not been obtained.

333. Effect of (b) forfeiture on under-lessee.—Ordinarily forfeiture implies annulment of the original and derivative leases. But where forfeiture is the result of the lessee's own fraud, it is not allowed to affect the under-lessee. In England in all actions by a lessor to enforce a right of re-entry or forfeiture, the under-lessee of a part of the whole of the demised property is permitted to obtain an order vesting the property for any term not exceeding the unexpired portion of the lease upon terms as to execution of any deed or other document, and payment of rent, costs, expenses, damages which the Court is empowered to fix.¹ But no such relief can be claimed by the under-lessee under the Act.

In the second paragraph, the word "lessor" is clearly a misprint for "lessee." It is against the "lessee's" fraud that the under-lessee had to be protected.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one-hundred and six.

Illustrations.

- (a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The first five years expire, but *C* continues in possession of the house, and pays the rent to *A*. *C*'s lease is renewed from month to month.
- (b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A*'s assent. *B*'s lease is renewed from year to year.

339. Analogous law.—This section must be regarded as supplemental to sec. 111 (a) according to which a lease determines

¹ Sec. 4, Conveyancing Act, 1892 (55 & 56 Vic., C. 18).

by efflux of time limited thereby. In its principle the section corresponds with the English law under which the position of a tenant holding over is exactly similar.¹

840. Principle.—This section authoritatively introduces into this country a rule of law which was well recognized even before the Act, when following the analogy of English cases the Courts gave to the tenants substantially the same *status* which he has been now given under the Act.² The equitable rule here enacted considerably relaxes the rule as to registration enacted in sec. 107.

841. Tenant's position on expiry of lease.—After his lease determines the tenant has no right to continue in possession of the property. And if he does so, the landlord may at once proceed to eject him, for his possession is then no longer legal but only permissive. In the language of the English law, such a person then becomes a tenant on sufferance, i.e., a tenant "who comes in by right and holds over without right." Being a tenant without right, he has the barest possession without title and which he cannot alienate, or transmit to his heirs. "A tenant on sufferance," says Woodfall, "is one who entered by a lawful demise or title, and after that has ceased, wrongfully continues in possession without the assent or dissent of the person next entitled. . . . There is a great difference between a tenant at will and a tenant on sufferance: the former is always in by right; but the latter holds over by wrong after the expiration of a lawful title."³ Since the tenant on sufferance is allowed to hold through laches of the landlord, there can be no such tenant against the Crown, for the Crown is not capable of committing laches, and hence it follows, that the position of such a tenant is no better than that of an intruder.⁴ A tenant on sufferance is liable to be turned out without any notice to quit,⁵ but his position being not exactly of a trespasser, he cannot be forcibly ejected even though there may be a proviso in the lease in favour of forcible entry.⁶ This appears to be clearly the law in this country,⁷ although in England the authorities on the point are by no means unanimous. Thus while Fry, J. in *Beddall v. Maitland*,⁸ has on review of the authorities

¹ Woodfall, *Landlord and Tenant* (16th Ed.), 238, 788.

² *Sayaji v. Umaji*, 3 B. H. C. R., 27; *Nocorodass v. Jewraj Baboo*, 12 B. L. R., 268; *Chatur Singh v. Makund Lall*, I. L. R., 7 Cal., 710.

³ Woodfall, *Landlord and Tenant* (16th Ed.) p. 245; Co. Litt., 57b, 270b; 1 Steph. Comm., 278.

⁴ Co., 57b, Cole on Ejectment, 456.

⁵ Woodfall, *Landlord and Tenant* (16th Ed.), 866; *Attakuthe v. Govinda*, I. L. R., 16 Mad., 97; *Harogovind v. Ramratno*, I. L. R., 4 Cal., 67.

⁶ *Edrick v. Hawkes*, 18 Ch. D., 199.

⁷ Indian Penal Code (Act XLV of 1860), s. 99 (3).

⁸ 17 Ch. D., 174 (186). The English statute against forcible entry [5 Rich. 2, Stat. 1, C. 8 similarly enacts: "that none from henceforth make any entry into any lands and tenements, but in case where the entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will"].

laid down as a general result, that when a man is in possession, he may use force to keep out a trespasser, but if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. It has been also laid down that "a lessor, at the determination of the term, may enter forcibly into possession of the demised premises, and after civilly requesting the tenant to depart, in case of his refusal or neglect to comply with such request, gently lay hands upon him to turn or push him out; and in case of any resistance on his part, may use such force and violence as may be necessary to overcome such resistance."¹

Supposing now that the lessor instead of ejecting the tenant allows him to continue in possession, and moreover either accepts rent, or otherwise expresses his assent to the continuance of the tenancy, what is the position of such a tenant? According to the section in such a case the tenant shall be deemed to be a tenant for an indeterminate period the duration of whose tenure shall be presumed to be either from year to year, or from month to month as specified in sec. 106. But, of course, the presumption may be rebutted by an express agreement to the contrary. The section is silent as to the terms upon which the new tenancy shall be presumed to continue, but there can be no doubt that the tenant must continue to abide by the terms contained in the expired lease, so far as they are consistent with a yearly or monthly tenancy.² Having once entered as a tenant subject to the obligations attaching to his tenancy, he cannot be allowed to afterwards change them without the consent of the landlord.³ As Lord Mansfield in one case observed: "If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of a contract. They are supposed to have renewed the old agreement which was to hold for a year."⁴ The new tenancy will be deemed to commence on the same day on which the lease began, and notice to quit should be given accordingly.⁵

842. Evidence of consent.—The tenant taking advantage of the section would be required to shew that the landlord or his legal representative has accepted rent from the lessee for the subsequent period, or has otherwise assented to his continuing in possession as a tenant. But the mere fact that the lessor has suffered him to remain in possession without protest has in one case been held to be sufficient to shift the onus.⁶ And in another case a similar observation was made by Lord Esher, M. R., who said: "I should have said that the mere fact of their

¹ Woodfall, Landlord and Tenant (16th Ed.), 780, 781.

² *Sayaji Umaji*, 3 B. H. C. R., 27. (*Per Couch*, C. J., p. 30); *Nocoordass v. Jeuraj*, 12 B. L. R., 268; see to the same effect the English cases; *Bishop v. Howard*, 3 B. & C., 100; *Hyatt v. Griffin*, 17 Q. B., 505; 26 R. R., 291.

³ *Venkapa v. Bassangabba*, B. P. J. (1877), 254.

⁴ *Right v. Darby*, 1 T. R., 159; *Dougal v. McCarthy* [1898], 1 Q. B., 786 (789).

⁵ *Doe v. Samuel*, 5 Esp., 178; 8 R. R., 845.

⁶ *Wyatt v. Cole*, 26 L. T., 613, cited in Woodfall, Landlord and Tenant (16th Ed.), 238.

holding over as they did was evidence on which a jury ought to infer that they agreed to remain in possession as tenants, for I do not think the jury ought to infer that they intended to remain in possession as trespassers."¹ A mere demand of rent by the landlord has been held to be a sufficient evidence of assent even though in reply the tenant might intimate his intention to determine the tenancy. Thus where the landlord demanded a quarter's rent due in advance, and the tenants continued in possession for a month after the demand without answering it, after which they wrote to him that it was "their intention to discontinue their present tenancy, and that they gave him notice that they would not continue the same beyond the period required under their agreement, but that they would be glad if he could see his way to take up the premises, &c.," it was held that the fact that the landlord allowed the tenant in possession and demanded a quarter's rent from them on the footing of the previous tenancy was sufficient evidence of consent on the part of the landlord and the fact that the tenants remained actually in possession was sufficient to bind them despite their letter which was not inconsistent with their tenancy as evidenced by possession.² It does not appear that the fact that the rent demanded is higher or lower than the previous rate affects the question.³ Payment of rent to the lessor is undoubtable evidence of assent, but the lessor may show that he accepted the rent under a mistake, as that he was unaware of the death of one of the lessees when he accepted it,⁴ or the lessor's representative may show that he did not know of the terms of the original lease.⁵ Actual payment of rent is, however, by no means necessary to constitute the new relation. No doubt actual payment furnishes the clearest proof, but where the payment of rent is allowed to stand over by mutual consent, that is sufficient.⁶

848. Limitation.—It has been stated before that the possession of a tenant holding over cannot be regarded as that of a trespasser. But it is still a question whether he can be regarded as anything more than a trespasser for the purpose of the Limitation Act according to which a landlord is allowed no more than twelve years to recover possession from a tenant calculated from the time when the tenancy is determined.⁷ The solution of the question must entirely depend upon when the tenancy must be regarded as determined. If after the efflux of time originally limited by the lease, the "tenancy is determined," in the sense that the tenant then has no right to hold the property, and that therefore his possession is necessarily wrongful, then it follows that limitation would begin to run against the landlord from the date of expiration of the original lease. Now there can be no doubt that a tenant

¹ *Dougal v. McCarthy* [1898], 1 Q. B., 736 741).

² *Dougal v. McCarthy* [1898], 1 Q. B., 736.

³ *Digby v. Atkinson*, 4 Camp., 275; 16 R., R., 792.

⁴ *Doe v. Crage*, 6 C. B., 90.

⁵ *Oakley v. Monck*, 1 Ex., 159.

⁶ *Woodfall, Landlord and Tenant* (10th Ed.), 282; *Cox v. Bent*, 5 Bing., 185; *Vincent v. Godson*, 24 L. J. Ch., 122.

⁷ Art. 139, Sch. 2, Indian Limitation Act (Act XV of 1877).

by sufferance ostensibly holds possession without any right and therefore it follows that under Art. 139 of the Limitation Act time begins to run against a landlord when the period of a fixed lease expires.¹ But this view while in accord with that taken by the Calcutta High Court,² is opposed to the one followed in Madras,³ where the possession of a tenant by sufferance is held to be not adverse to the landlord.

It is, however, clear that the possession of a tenant after the expiration of the lease must be either as of right or adverse. That his possession is illegal cannot be denied. No doubt the landlord may allow him to continue in possession, but unless he does so, there seems to be no reason why it should not be held that the tenancy which has determined in fact should not be held to have also determined in law. In England, since the passing of the Statute, 3 and 4 William IV, C. 27, the possession of a tenant becomes clearly adverse to the person entitled from the date of expiration of the lease, and limitation begins to run from that date.⁴

But, where the landlord allows the tenant to continue in possession, as by accepting rent, or some other act showing his intention to continue the relationship there can be no doubt that the tenant's possession being permissive, is then no longer adverse.⁵ But here something further has been done by the landlord to take the case out of the purview of Art. 139 of the Limitation Act. And only slight evidence is sufficient for this purpose.⁶

117. None of the provisions of this Chapter apply

**Exemption of leases
for agricultural pur-
poses.**

to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of

the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be applicable, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

¹ *Kanthappa v. Sheshappa*, I. L. R., 23 Bom., 893 (898).

² *Gale v. Maharanas Broomutty*, 15 W. R., 183; *Chowdhry Ishareool Huq v. Bhoosae Mahtoon*, 25 W. R., 201; *Chatur v. Makund*, I. L. R., 7 Cal., 710 (712); *Madho v. Tekait Ram*, I. L. R., 9 Cal., 411 (417).

³ *Adimulam v. Pir Ravuthan*, I. L. R., 8

Mad., 424.

⁴ *Lyell v. Kennedy*, 18 Q. B. D., 796 (813).

⁵ *Krishnaji v. Antaji*, I. L. R., 18 Bom., 286 (288); *Kanthappa v. Sheshappa*, I. L. R., 22 Bom., 898; *Tatia v. Sadashiv*, I. L. R., 7 Bom., 40.

⁶ *Kanthappa v. Sheshappa*, I. L. R., 22 Bom., 898.

844. Analogous law.—The relationship of landlord with the tenant for agricultural purposes has been amply dealt with by the local Acts suited to the requirements of the different Provinces. Thus the Bengal Tenancy Act¹ for Bengal, the Land Revenue Code for Bombay,² the Tenancy Act for Madras³ and a similar Act for the Central Provinces,⁴ and the North-West Provinces Rent Act for the North-West Provinces⁵ more or less exhaustively dealt with the subject of agricultural leases exclusively. The Chapter has, however, been so generally worded that the Local Governments would have no difficulty in adapting its provisions to agricultural leases, should any necessity arise therefor. But no Local Government has yet extended the Chapter to agricultural leases.

It has been noticed before (§ 705) that this Chapter for the first time makes a special provision as regards non-agricultural leases, which were before the Act generally governed by the same law.⁶

845. Scope of the section.—The effect of the section is to exclude all agricultural leases from the operation of the Chapter. But horticultural leases are subject to its operation.⁷ Similarly a lease of a coffee garden,⁸ or of a plot for building purposes and for establishing a coal depôt is not an agricultural lease within the meaning of the section.⁹

¹ Act VIII of 1885.

² Bom. Act V of 1879; see also Khoti Act, Bom. Act I of 1880.

³ See also Madras Rent Recovery Act, Mad. Act VIII of 1865.

⁴ Central Provinces Tenancy Act XI of 1898; see also Central Provinces Land Revenue Act XVIII of 1881.

⁵ Act XII of 1881.

⁶ *Madhab Chandra v. Bejoy Chand*, 4 C.

W. N., 574.

⁷ Mr. Stokes' Speech, Legislative Council (Appendix); cf. *Ram Narain v. Maangru*, 4 C. W. N., cc.; but see the obiter dictum of Maclean, C. J., in *Umrao Bibi v. Mahomed Rajabi*, I. L. R., 27 Cal., 205 (207).

⁸ *Kuntayen Haji v. Mayan*, I. L. R., 17 Mad., 98.

⁹ *Raniganj Coal Association v. Judeonath*, I. L. R., 19 Cal., 490.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."¹

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

846. **Analogous law.**—This section has been borrowed from sec. 903 of the New York Civil Code, and applying as it does to both moveable and immoveable property supplies a deficiency noticed by the Calcutta High Court,¹ in the Indian Contract Act.² The section should be compared with the definition of "sale" as given in sec. 77 of the Indian Contract Act³ and in sec. 54 of the Act.

847. **Principle.**—The distinction between a "sale" and an "exchange" was once upon a time the subject of much learned discussion, which centered round the meaning of the term "price." To constitute a sale three things were required, (1) a thing, (2) an agreement between two persons to give one for the other, and (3) a price. That the first two elements are common to both the modes of transfer was admitted. But it was contended by Sabinus and Cassius that the term "price" should include both money as well as anything else, a slave, a robe or a farm, for instance. The contention was made on the authority of Homer who in one place speaks of the Greek army having obtained wine for itself by bartering certain things. His words are :—"And thence too wine was got by the long-haired Achæans, some bartering for it bronze, and others the glistening steel, some hides, and some the cows themselves, and some again slaves." Proculus justly impugned this contention by citing other lines

¹ In *Esprey v. Juggesur* [1878], 1. L. R., 3 Cal., 379 (382). "The change of a Government currency note for money is no more a contract of sale than the payment of the same note over the counter of goods is a

sale of the note for the goods" (*ib.*), p. 382
Per Ainslie and McDonnell, JJ.

² Act IX of 1872.

³ Act IX of 1872.

from the Polt, and shewed the absurdity of regarding the same thing at once as the thing sold and price paid. It has been, therefore, held that the price paid or payable in a sale must be money only,¹ for if "there is an agreement that I shall sell you my horse for one of your books, this agreement does not constitute a sale, but a different kind of contract, viz., an exchange."² In a sale, it is only necessary that the contract must be for a price, after that the payment may be made in goods, for there is nothing to hinder the seller, after the contract is made, from agreeing to take goods for the price.³ And it is enough if only a part of the consideration is a price.

The term "exchange" is usually used to denote the reciprocal transfer of interests in immoveable property,—the corresponding transfer of interests in moveable property being denoted by the word "barter."

848. Meaning of words.—"Exchange" must be distinguished on the one hand from "sale" and on the other from "partition" or "gift." Sale is always for a price which means money or the currency of the land. No price is paid in "exchange," but one specific property is transferred for another. In partition there is an arrangement whereby co-owners possessing an undivided interest in one or several properties take by arrangement a specific property in lieu of their shares in all.⁴ In "gift" there is no consideration for the transfer of the thing given.⁵

"The ownership of one thing:" ownership is here used in its wider sense and does not include possession. Similarly "thing" as used in the section means any property whether moveable or immoveable. "Money" would include token currency as well, as for example, coppers, or currency notes.

849. Essentials of "Exchange."—An "exchange" like a "sale" assumes the presence of two parties. They must mutually grant reciprocal estates to each other.⁶ If one property is exchanged for a price, i.e., money, it is then no longer an exchange but a sale. But where money is paid by way of equality of exchange, the transaction does not lose its characters.⁷ Thus where the contract was that certain goods should be paid for partly in money and partly in buttons, the transaction was pronounced to be one of exchange and not of sale.⁸ An exchange can only be between two parties; and if three mutually grant reciprocal, viz., A to C, B to A, and C to B, and A is evicted of the tenements granted to him by B, A cannot recover of C the tenements granted

¹ *Queen-Empress v. Appara*, 1 L. R., 9 Mad., 141; *Poltart v. Fettivelu*, 1 L. R., 11 Mad., 459 (467).

² Pothier, Obligations, No. 6.

³ Hunter's Roman Law, p. 491.

⁴ *Gyannessa v. Mobakarannessa*, 1 L. R., 25 Cal., 210 (215).

See sec. 123, post.

⁵ *Elton College (Provost) v. Winchester (Bishop)*, 8 Wils., 458 (485).

⁷ *Turner v. Edgell*, 6 L. J. (N. S.) Ch., 301; but contra in Pothier, Contract de Vente, sec. 30; *Bach v. Owen*, 5 T. R., 409.

⁸ Per Buller, J., in *Harris v. Fowle*, 1 H. Bl., 287; *Taylor v. West-Holt*, N. P., 179.

to him by 4.¹ A contract of barter when once complete cannot be afterwards turned into one of sale.² Money may be exchanged for money, being *ejusdem generis*,³ and with the exception of what is not transferable,⁴ any property may be given or taken in exchange. The two things and interests which the parties may mutually exchange need not be identical. And in this respect the law now enacted seems to differ from the rule of Hindu law and of the English Common law. Thus for example, Jagannath has laid down that the subjects exchanged must be of the same nature.⁵ According to Jagannath their quantity or pecuniary value must also be equal.

850. Exchange how made.—"A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale." Hence where registration or delivery of possession would have been essential to complete the transfer of such property by sale, it would be necessary to also complete the transfer by exchange.⁶ Where an exchange has to be effectuated or evidenced by a registered writing, two documents must be executed, by the owner of each property to the other. For the purpose of registration, the properties exchanged would have to be valued. The clause must be in this respect regarded as subject to sec. 54 of the Act and sec. 17 of the Indian Registration Act.⁷ But it overrules the rule of Hindu law whereby a verbal transfer of land by way of exchange was allowed.⁸ An "exchange" should not be confounded with "partition." The former requires registration, the latter does not. Thus where some of the co-owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their share in all the properties, the transaction was regarded as amounting to a partition and not an exchange.⁹

An exchange may be made subject to or in consideration of the mines and minerals or easements.¹⁰

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

Right of party deprived of thing received in exchange.

¹ *Eton College (Provost) v. Winchester (Bishop)*, 3 Wills., 458 (485).

² *Harrison v. Luke*, 14 M. & W., 180.

³ *Emp. v. Joggesur Mochi*, 1 L. R., 3 Cal., 382.

⁴ See sec. 6.

⁵ 2 Colebrooke's Dig., 836; *Bartram v. Whitchote*, 6 Sim., 86; *Ferrand v. Wilson*, 4 Haro, 885.

⁶ *Gyannessa v. Mobarakhannessa*, 1 L. R., 25 Cal., 210 (212).

⁷ Act III of 1877.

⁸ *Manlena v. Chakuri*, 1 M. H. C. R., 100.

⁹ *Gyannessa v. Mobarakhannessa*, 1 L. R., 25 Cal., 210.

¹⁰ Cf. sec. 17, Settled Land Act, 1882 (45 & 46 Vict., c. 38).

851. Analogous law.—This section may be compared with sec. 109 of the Indian Contract Act,¹ which enacts that “If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller’s title, deprived of the thing sold, the seller is responsible to the buyer or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.” See also sec. 55 (2) which makes a similar provision as regards sale.

852. Principle.—In the absence of an agreement to the contrary, the parties making the exchange are deemed to covenant for title, and if in consequence of defective title either party to the transaction is deprived of the property received by him in exchange, he is entitled either to cancel the transfer and to get back his property, or to obtain compensation. But the section allows relief to the parties exchanging only in two specified cases, viz. (1) that there has been *deprivation* of the thing or part thereof and not merely of its enjoyment, and (2) that such deprivation is due to *defective title* of the other party. The only person entitled to relief, it would appear, is the party making the exchange and not as under sec. 109 of the Indian Contract Act, also “any person claiming under him.” The right then cannot be exercised as against a *bond fide* purchaser without notice.

853. Meaning of words.—“*Deprived of the thing* :” must mean dispossessed of a thing. “*Entitled at his option to compensation, &c.*” i.e., the party is not entitled to *both* the reliefs.

854. Consequence of defective title.—According to the English law a defect of title is not by itself sufficient to defeat an exchange. But since in an exchange the consideration for the transfer of one property is the property received in exchange, the consideration fails, if the property so received is defective in title and consequently the party receiving it in exchange is on that account evicted or dispossessed from it. He can then either recover back his own property exchanged for, or if he so chooses sue the other party only for damages. And ejection from only a part of the party entitles him to the same relief as if he had been ejected from the whole.² But whether a party to an exchange is deprived of the whole or only a part of the property he has so received, if he wishes to avail himself of the covenant implied by law under this section, he must sue to set aside the whole transaction and claim to be placed in the position in which he was before the exchange. He cannot recover an equivalent portion of the lands he has lost.³ He cannot repudiate the contract in part only : he cannot pick out the plums of a bargain into which he has been misled and reject the remainder.⁴ The owner of a fractional

¹ Act IX of 1872.

² *Subramania v. Saminatha*, 1 L. R., 21 Mad., 69 (73).

³ *Veera v. Poonnambala*, 9 M. L. J. R.,

187; following *Bustard's case*, 4 Coke, 121.

⁴ *Per Bowen, L. J., David v. Sabin* (1898), 1 Ch., 523 (540).

property by exchange is entitled to call for the title-deed of the property of which he holds a part from the other co-sharer.¹

855. In the case of a contract to the contrary, the provisions of the section become inapplicable. This is in accordance with the English rule. As Chancellor Kent said : "An express covenant will do away the effect of all implied ones."² Thus where in a case the plaintiff and defendant effected an exchange of land, subsequently executing to each other documents of which that executed by the defendant recited the exchange and continued "if any claim or dispute arises I hereby bind myself to settle it. If I do not so get the dispute settled I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli of land for lands which go out of your possession." The plaintiff was subsequently ousted from the land conveyed to him, and he having sued to recover the land which he had given in exchange, it was held that the defendant having expressly covenanted to compensate for the plaintiff's ouster in a particular way, the operation of the section was excluded, and that all that the plaintiff could claim was compensation up to the amount specified in the document. The covenant to compensate for ejectment did not leave the right to recover the land under the section intact, for in the words of Lord Denman, C. J., which are here apposite, "Where parties have entered into written engagements with expressed stipulations it is manifestly not desirable to extend them by any implication; the presumption is that, having expressed some, they have expressed all the conditions by which they intended to be bound."³

856. Limitation.—It has been held in Madras that a suit for the recovery of equivalent land in pursuance of a covenant by which the parties to an exchange had agreed that "should any objection arise with reference thereto, equivalent land should be given back," falls under Art. 113 of the Limitation Act, and consequently a suit instituted after three years from the date of the eviction would be barred.⁴ The ruling, however, is based upon the construction placed upon the clause above quoted, which was regarded as constituting a covenant, and not a provision for re-entry on the happening of a condition subsequent, in which case the longer period would have been admittedly allowed.

120. Save as otherwise provided in this chapter,
 Rights and each party has the rights and is
 Liabilities of parties. subject to the liabilities of a seller
 as to that which he gives, and has the rights and is

¹ *Lord Sandbury v. Briscoe*, 2 Ch. Cas., 49.

² *Nokes v. James*, 4 Co. Rep., 80; cited in *Subramania v. Saminatha*, I. L. R., 21 Mad., 69 (71).

³ *Aspdin v. Austin*; cited with approval in

Pallikelagatha v. Sigg, L. R., 7 I. A., 89; also in *Subramania v. Saminatha*, I. L. R., 21 Mad., 69 (72).

⁴ *Veera v. Poennambala*, 9 M. L. J. R., 137.

subject to the liabilities of a buyer as to that which he takes.

857. Analogous law.—This section is borrowed from the New York Civil Code, sec. 905. Where the thing exchanged is immoveable property the rights and liabilities of the exchanging parties will be regulated by sec. 55, and where the thing is moveable property the transaction will *mutatis mutandis* be governed by secs. 76 to 123, forming Chap. VII of the Indian Contract Act.¹

858. Principle.—The rights and liabilities of the parties to an exchange are the same as of vendor and purchaser of immoveable property, or if the subject of the exchange is moveable property of goods.² Sale and exchange have been treated alike from very early times. Thus Blackstone defines sale or exchange to be a transmutation of property from one man to another, in consideration of some price or recompense in value.³ Since sec. 55 is subject to any express contract to the contrary, and the Contract Act saves, "any usage or custom of trade, or any incident of any contract not inconsistent with the provisions"⁴ of that Act, the rights and liabilities of the parties must be taken as subject to those reservations.

859. Rights and liabilities.—The doctrine of *caveat emptor* is now no longer current in India. Even in England the rule is said to be circumscribed by so many exceptions as "well nigh to eat up the rule."⁵ Both under sec. 55 of the Act and sec. 109 of the Indian Contract Act,⁶ there is a clear warranty of title implied in every contract. And in the case of moveable property, moreover, there is "an implied warranty of goodness or quality" which may be established by the custom of any particular trade,⁷ and as regards provisions such a warranty is implied in the contract.⁸ Thus it was held in a case that where according to mercantile usage in the cotton trade in Tuticorin, a dealer delivered cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vested in the owner of the cotton press who was bound to give the merchant in exchange cotton of like quantity and quality. If, therefore, cotton thus delivered was accidentally destroyed by fire the loss would fall on the owner of the press in whom on delivery its ownership had become vested.⁹

860. In England the law in this respect is not on all fours with the Indian law with reference to warranties as to quality upon sale or exchange of goods, for there the rule still is *caveat*

¹ Act IX of 1872.

² So also in Black. Comm. II, 448.

³ Black. Comm. II, 44.

⁴ Sec. 1, Indian Contract Act (Act IX of 1872); *Volkart v. Fettivelu*, I. L. R., 11 Mad., 459 (462).

⁵ Per Lord Campbell in *Bichols v. Bannia-*

ter, 24 L. J. C. P., 105.

⁶ Act IX of 1872.

⁷ Sec. 110, Indian Contract Act (Act IX of 1872).

⁸ Sec. 111, Indian Contract Act (Act IX of 1872).

⁹ *Volkart v. Fettivelu*, I. L. R., 11 Mad., 459.

emptor. Therefore where a party procured another to exchange his bad burgundy for other wine, on the principle of *caveat emptor*, the person receiving bad burgundy in exchange was held to have no remedy.¹ In this country, however, under sec. 111 of the Indian Contract Act² he would have been clearly entitled to cancel the bargain.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

861. Analogous law.—This section is adopted from the Draft New York Code, sec. 906.

862. Principle.—A person who gives bad money for good is clearly bound to return that which he has taken in return for his spurious money. Similarly a purchaser cannot make his purchase by tendering bad coin, and if the vendor receives it in ignorance of its spuriousness, and afterwards discovers it, he can cancel the bargain and recover his goods.³ So a person who, without knowledge of the forgery, discounts a forged bank note, is entitled to recover back the money paid by him, for in such a case there is a failure of consideration.⁴ The section only applies to spurious money and not to money depreciated by use and wear. The term "money" must be distinguished from "coin," the former being a generic term including the latter, the use of which is confined to denote "metal used for the time being as money, and stamped and issued by the authority of some state or sovereign power in order to be so used."⁵ Therefore cowries or lumps of unstamped copper though used as money are not coins. Again, obsolete coins such as gold-mohurs or Farukhabad rupees have been held to be coins although no longer current as such.⁶ Medals are not money.

¹ Per Lord Ellenborough in *La Neuville v.*

Q. B. D., 84.

Nourse, 3 Camp., 351.

² Sec. 230, Indian Penal Code (Act XLV of 1860).

³ Act IX of 1872.

⁴ *Id.*, illus. (c); *Queen v. Kunj Behares*, 5 N.-W. P. H. C. R., 187.

⁵ *Jones v. Ryde*, 5 Taunt., 488.

⁶ *Leeds and County Bank v. Walker*, 11

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consi-

"Gift" defined.

deration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of the donor, and while he is still capable of giving.

Acceptance when to be made.

If the donee dies before acceptance, the gift is void.

863. **Analogous law.**—This chapter, it should be noted, applies to both moveable and immoveable property. The chapter has no application to gifts of moveable property made in contemplation of death, nor to Mohammedans, and except as provided by sec. 123, it leaves untouched also the Hindu and Buddhist laws.¹ The law of gifts and wills is analogous. Thus in delivering the judgment of the Privy Council, Willes, J., observed: "The law of wills has, however, grown up, so to speak, naturally from a law that furnishes no analogy, but that of gifts; and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have hitherto prevailed in like cases...The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred."²

Law of gifts and wills analogous.

¹ Sec. 129, post.

² *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*, 9 B. L. R., 577, P. C.; followed in *Fallinayagam v. Panchche*, 1 M. H. C. R., 326; *Baboo Beer Pertab v. Maharaja Ra-*

jendra Pertab, 12 M. J. A., 1; *Venkata Rama v. Venkata Suriya*, 1. L. R., 1 Mad., 231; on appeal 1. L. R., 2 Mad., 333, P. C.; *Court of Wards v. Venkata Suriya*, 1. L. R., 20 Mad., 167 (175).

864. Historical retrospect.—As the provisions relating to gifts in force before 1882 are still of much practical utility, a short *resumé* of the law previously in force may not be out of place here. In the Civil law *donations* were divided into two classes, namely, *donatio mortis causa*, and *donatio inter vivos*. All that was required for a *donatio* to be completed, is that the donor should

Roman law.

have made it out of his own free will, and that the donee should have consented to its acceptance,¹ but that the requisite free will might be destroyed by the existence of violence (*vis*) or compulsion (*metus*). Delivery was the essential to the validity of a *donatio*. But if the donor made a voluntary promise to deliver, he was bound to deliver what he had promised, but until delivery the contract remained inchoate and there was no change of ownership in the thing.² In the Civil law a *donatio* was regarded as a contract, which became irrevocable as soon as it was completed. The enactment of Constantine compelling the donor to effectuate a gift by means of writing containing a description of the nature of his rights and of the property and which was to be registered and delivered to the donee in the presence of witnesses, was found to be too cumbersome, and it was accordingly repealed by the rules introduced by Justinian, by which the validity of an oral gift unaccompanied by any of the formalities prescribed by Constantine was recognized. Justinian also did away with an old statute³ prohibiting gifts beyond a certain amount.⁴

865. A *donatio mortis causa* is a gift, made in anticipation and in the event of death. Such gifts are of great antiquity. Their object is to convey the property to the donee only in the event of the donor's death. The latter in fact makes a conditional bequest with the words "if I live, I shall of course continue to enjoy the property, but if I die, I wish that you shall take possession of my property rather than my heir take it." Thus in Homer, Telemachus making gifts to Peiræus says: "Peiræus, for we know not at all how these deeds shall be, if the haughty suitors shall slay me by stealth in the halls, and divide among them all that was my father's, I wish you to have these things and enjoy them rather than one of them. But if among them I shall plant slaughter and an evil fate, then to me in my joy bring these things to my home in thy joy." The essential requirements of a *donatio mortis causa* were the same as those of an ordinary gift, viz. (1) giving by the donor; (2) acceptance by the donee; and (3) delivery. Such a gift was however at any time revocable at the option of the donor, and in no case did it take effect until his death. Such a gift has many points in common with a legacy, but as will be hereafter

¹ *Quod donator habeat, animum donandi et donatorius animus recipiendi.*

² Just. Bk., 2, Tit., 7, A. 2; but see *Cochrane v. Moore*, 25 Q. B. D., 57 (66); in which Fry, L. J., observed that, "by the law of Rome, at least since the time of

Justinian, gift had been a purely consensual transaction, and did not require delivery to make it perfect, *ib.*, p. 66.

³ Lex. Cincia, 204 A. C.; see Ulp. Frag., para. 1.

⁴ Just. Bk., 2.

pointed out the two forms of alienation are quite distinct and subject to different legal incidents.

866. A *donatio inter vivos* was a gift between two living persons, and ordinarily subject to no conditions. Once completed by acceptance and delivery such a gift became irrevocable and beyond the control of the donor. There is, however, one species of a *donatio inter vivos* which might have been both conditional and revocable. This form of gift, known as the *donatio ante nuptias* was a very common form of gift made by the engaged couple to each other before marriage. It does not appear that such gifts could be made by the husband to his wife after marriage, as it was said by the Emperor Antoninus that the object of marriage being the satisfaction of an honourable love, neither party should gain money by it.¹ But birth-day gifts and those made to take effect after the dissolution of marriage, were however allowed. And gifts made so as to be invalid during marriage were also allowed to take effect after the death of the donor unless expressly revoked. Gifts made to concubines and their offspring were prohibited by Constantine,² but Justinian allowed that if the donor had legitimate issue he could give to his concubine or natural children property not exceeding one-fifth of his estate, and in any other case he was free to give what he liked leaving only his ascendants suitably provided for.³ This law of Rome has been the corner-stone of later legislation. Its influence has permeated the jurisprudence of all modern Europe. In the words of Gibbon "the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe; and the laws of Justinian still command the respect or obedience of independent nations."⁴ The English system of Equity has been built upon it,⁵ and Bracton and Coke have made it an integral part of their commentaries, and from thence it has been assimilated with the legislation of England's colonies and dependencies.⁶

867. In England a gift of both moveable and immoveable property must be by deed. In all other respects its essentials remain the same as in the civil law. But a *donatio mortis causa* must be made "in such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event."⁷ Of course such a gift

English law.

only takes effect in case of the donor's death. But delivery is all the same essential. And it has been held that if for any reason the gift is incomplete "the Court will not aid a volunteer to carry into effect an imperfect gift."⁸ Gifts made in anticipation of marriage are valid, and it has been held that if a person who makes

¹ Dig. Bk., 24, Tit. 1, sec. 8.

² Nov. 89.

³ Nov. 89, sec. 2.

⁴ Decline and Fall of the Roman Empire, XLIV.

⁵ Mackenzie's *Study in Roman Law*, 40.

⁶ Sir J. Stephen's *History of the Criminal Law I.*, 49, 50.

⁷ *Edwards v. Jones*, 1 My. & Cr., 233.

⁸ *ib.*; *Morris v. Burroughs*, 1 Atk., 401; *Jones v. Lock*, 1 Ch., 25; *Wheale v. Oliver*, 17 Beav., 352.

addresses with a view of marriage, and on reasonable expectation of success gives presents, and the lady deceives him afterwards, the presents ought to be returned, or the value of them allowed; but where they are made to introduce a person only to a woman's acquaintance, he is looked upon in the light of an adventurer, and, if he lose by the attempt, he must take it for his pains, especially when there is a disproportion between the lady's fortune and his own.¹

368. Under Hindu law there are the same three essential requisites—*a giving, either orally or by writing, with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's lifetime.* As respects the legal requisites to constitute a perfect disposition by gift, Hindu law makes no distinction between a gift *inter vivos* and that made in contemplation of death.² According to it a gift however made takes effect immediately. And Hindu law

Hindu law. is, in some respects, less rigid in its requirements as to delivery than the laws of Rome or England. A gift for certain purposes, if made even verbally, the heir is bound to satisfy. But formerly it was held in cases, the authority of which is much shaken by the decision on the subject by the Privy Council, that a gift is not complete without delivery of actual or symbolical possession.³ Such possession, it was said, may be given by either permitting the donee to receive rents, or by handing over to him documents of title, or allowing him to exercise other rights of ownership. And where the donee is already in possession, a mere declaration by the donor assented to by the donee that he has parted with possession in favour of the donee has been held to be sufficient.⁴ Against these cases it should be mentioned, that as to the necessity of possession, the Calcutta High Court has repeatedly held that under Hindu law possession is by no means an ingredient essential to the validity of a Hindu gift,⁵ and this is the view now taken by the Privy Council.⁶ But in Bombay it has been held that a deed of gift even though registered, if unaccompanied by possession is not sufficient to give a good title against the donor unless there be a valuable consideration,⁷ and a gift was allowed to be made subject

¹ *Robinson v. Cumming*, 2 Atk., 409.

² *Vizalatchmi v. Subba Pillai*, 6 M. H. C. R., 270.

³ *Harjivan v. Naran*, 4 B. H. C. R. (A. C.), 81; *Bank of Hindustan v. Prenchand*, 5 B. H. C. R. (O. C.), 83; *Vasudeo Bhat v. Narayan*, 1. L. R., 7 Bom., 181; *Venkattachella v. Thathammal*, 4 M. H. C. R., 460; *Man Bhari v. Nannith*, 1 L. R., 4 All., 40.

⁴ *Bai Kukul v. Lakshma*, 1. L. R., 7 Bom., 452.

⁵ *Moheshur Bukeh v. Gunoon*, 6 W. R., 45; *Anunchand v. Kishen Mohun*, 1 Sol.

Rep., 152; cited and followed in *Tara Bebee v. Ghasiram*, 3 C. L. R., 247; *Kalidas v. Kanhayalal*, 1. L. R., 11 Cal., 121, P. C.; *Dharmodas v. Nistarini Dasi*, 1. L. R. 14 Cal., 446; *Ram Chandra vi Ranjit Singh*, 1. L. R., 27 Cal., 242; but contra in *Lakshimani v. Nityananda*, 1. L. R., 20 Cal., 464.

⁶ *Kalidas v. Kanhaya Lal*, 1. L. R., 11 Cal., 121, P. C.; *Mannu Singh v. Umdet Pande*, 1. L. R., 12 All., 528 (527).

⁷ *Vireparappa v. Maniappa*, 2 Bom. L. R., 69.

to a condition, but not a condition precedent.¹ It might have been accompanied by a trust or duty to be fulfilled by means of it or in return for it.² The Hindu donor was circumscribed by many prohibitive restrictions, but these belong rather to the capacity of the donor than to the validity of the donation, and which would therefore still hold good. All these restrictions will be found discussed under sec. 129.

869. Under the Mohammadan law a *hiba* or gift may be similarly made in the same manner, and the same three conditions are also there necessary in order to validate it. But Mohammadan law like the Hindu law is not particular about the necessity of the transmutation of actual possession. No doubt possession must follow the gift, but modern Mohammadan jurists have allowed

that if instead of actual possession the donee is able to take possession, it is regarded as sufficient. Such possession may be transferred by making over the key or title-deeds of the house gifted to the donee, or by some other act symbolizing the transmutation of possession. But a gift without any possession at all is void,³ unless it is made for consideration in which case the delivery of possession is immaterial. But in such a case there must be an actual payment of the consideration by the donee and a *bond fide* intention on the part of the donor to divest himself *in presenti* of the property and to confer it on the donee.⁴ And it is also insisted on that the transfer of possession must be immediate, otherwise the *hiba* is equally ineffectual.⁵ If at the time of making the gift the donor and the donee are both present on the property and the former unequivocally manifests an intention of transferring possession, that fact alone is sufficient to satisfy the requirement of law as to the change of possession. In such a case it is not necessary that there should be any formal entry or actual physical departure.⁶ But where the donor says no more than "that I have adopted A B to succeed to my property," there is evidently no relinquishment by the donor or seisin by the donee.⁷ On the question of possession the Mohammadan law intimately resembles the Hindu law, in that under both evidence of possession is not required where the gift is made by the father in favour of his minor child.⁸ A Mohammadan gift need not be in writing. If it is made subject to the performance of a condition, the gift is

¹ *Rambhat v. Lalshman*, I. L. R., 5 Bom., 680.

² *Ib.*

³ *Abedoonissa v. Ameeroonissa*, 9 W. R., 257; *Obedur Reza v. Mahomed Muneer*, 16 W. R., 88; *Shallian v. Shid Chunder*, 22 W. R., 214; *Falayet Hossein v. Maniram*, 5 C. L. R., 91; *Khajooroonissa v. Roushan*, I. L. R., 2 Cal., 184, P. C.; *Yusuf Ali v. Collector of Tipperah*, I. L. R., 9 Cal., 188; *Khader Hussain v. Hussain Begum*, 5 M. H. C. R., 114.

⁴ *Khajooroonissa v. Roushan*, I. L. R., 2

Cal., 184, P. C.

⁵ *Roshun Jahan v. Enact Hossein*, 5 W. R., 4; *Zohoorooddeen v. Baharoolah*, W. R. (1861), 165.

⁶ *Ibrahim v. Suleman*, I. L. R., 9 Bom., 146.

⁷ *Jaswant Singhjee v. Jet Singhjee*, 3 M. I. A., 245.

⁸ *Gyasoodeen v. Fatima Begum*, 1 Agra, 238; *Wajeed Ali v. Abdool Ali*, W. R. (1864), 127; *Munnoo Bibee v. Jehander Khan*, 1 Agra, 250.

valid, the condition being ignored as void.¹ Mohammadan law does not recognize a *donatio mortis causa*. All such gifts are there treated as legacies.² And it has been held that, if a person execute a gift while labouring under a sickness from which he never recovers and which ultimately proves fatal to him, effect can be given to the instrument only to the extent of one-third.³ A gift once completed cannot be revoked save by the decree of a judge or consent of the donee.⁴

The law as to gifts under the Hindu and Mohammadan law will be found more exhaustively set out under sec. 129.

§70. Principle.—A gift as contradistinguished from all other modes of voluntary alienations is a transfer without any consideration. By making a gift the donor gives or parts with his property through mere generosity, and without demanding any *quid pro quo* from the donee who on his part is bound to do no more than accept the gift. The thing given must be in existence. The necessity for such a limitation is apparent, for if the donor gifts away a thing not in existence his volition can at best relate to a thing in *possee* regarding which there can be no transmutation of possession and no proper acceptance by the donee. But such a gift though by itself imperfect may be subsequently perfected, as by ratifying it after the donor acquires the property.⁵ And according to the English law, a gift of property not in existence confers on the donee the licence to seize it after he has acquired it.⁶ A gift must be distinguished from a grant as the former is always gratuitous, whereas the latter is upon some consideration or its equivalent.⁷ Again where a transfer falls short of being regarded as a gift, it may still operate as a will. Indeed the distinction between a *donatio mortis causa* and a will is seldom perceptible. But as will be hereafter shewn, there are certain features in a gift which are wanting in a testament.

§71. Meaning of words.—"Gift:" usually means both the transfer, as well as the thing transferred. In this chapter, it is exclusively used in the former sense. "Certain:" there cannot be a gift of a thing undefined, nor of a thing not existing. "*Made voluntarily and without consideration*:" i.e., made in the exercise of free will and gratuitously. Consideration here means *valuable* consideration, i.e., money or money's worth, did not merely good consideration such as natural love and affection which usually prompt gifts. The phrase is borrowed from the New York Civil

¹ *Amiruddaula v. Nateri*, 6 M. H. O. R., 256; *Suleman v. Duruli*, I. L. R., 8 Cal., 1 P. O.

² *Ashadoollah v. Sheeba*, 2 Hay., 245; *Fussabun v. Ashruf*, 2 Hay., 163; *Ekin Bebe v. Ashruf Ali*, 1 W. R., 152.

³ *Kureemun v. Mullick*, W. R. (1864), 221; *Labbi Bebe*, 6 N. W. P. H. O. R., 159;

Ibrahim v. Suleman, I. L. R., 9 Bom., 146; *Mahomed v. Mariam Begum*, I. L. R., 3 All., 781.

⁴ *Enact Hossain v. Khoobunnisa*, 11 W. R.,

320; *Wajed Ali v. Abdool Ali*, W. R. (1864), 121; *Gulam Hossain v. Agi Ajan*, 6 M. H. C. R., 44.

⁵ *Lunn v. Thornton*, 1 C. B., 870.

⁶ *Thompson v. Cohen*, L. R., 7 Q. B., 527; *Reeves v. Barlow*, 12 Q. B. D., 486.

⁷ Black. Comm. II, 440; West and Buhler's Hindu Law (3rd Ed.) 191; H. H. Wilson in his collected works, vol. V. p. 90, says that when the fact is incontrovertible possession was dispensed with.

Code, sec. 500. "*Accepted by or on behalf of the donee:*" the acceptance must be either by the donee himself, or some other person capable of accepting it on his behalf. "*While he is still capable of giving:*" i.e., before his interest in the property has passed out, and he is able to make the gift. The incapacity referred to may be either physical, mental or legal.

872. Requisites of a "gift."—Under the section only two things are necessary to constitute a valid gift, namely, (1) an offer, and (2) its acceptance. Transfer of possession is unnecessary, the delivery of the deed of gift being in itself sufficient to pass the property to the donee.¹ The offer which the donor must make must be of a *certain existing* property. It must moreover be made "*voluntarily and without consideration.*" These conditions are not other than those imposed by the English law also. There cannot be a valid offer of a thing which cannot be identified.² Thus where a gift was made of "*all his present and future personality,*" it was held that the transfer was good as to the property of the transferor at the date of the execution of the deed, but bad as to the after-acquired property.³

873. As the acceptance may be made by or on behalf of the donee, so the offer may also be made either

(1) **Offer.**

by the donor himself or some one else on his behalf.⁴ In order to complete the offer there must not be a mere declaration to transfer *in futuro*, but an actual proposal. Thus where a donor who was the owner of a share in the colliery, on the 11th of February, 1865, wrote to the plaintiff, his daughter, as follows:—"I have another present to make shortly, one share of Ryhope Colliery . . . and you may now consider that you have this yourself from 2nd January to receive dividends upon. I am also going to give Sarah one, the same." On the 17th he attended a meeting of shareholders in the colliery, and signed the following entry in the minute book:—"That Mr. N.'s (his own) proposition of transferring two of his shares to the parties undernamed be agreed to, viz." (the plaintiff and her sister). It was admitted that this signature was not sufficient, according to the regulations of the deed of partnership, to pass the property in the shares. On the 25th of February, he again wrote to the plaintiff:—"I have arranged and made all right the shares for you and Sarah, and dividends will be sent from 2nd January." On the 4th of March the donor wrote to the plaintiff:—"Next meeting (private) we will be enabled to make another dividend, when you and Sarah will be informed." On the 16th of March he sent to the plaintiff a cheque for the first dividend, with a

¹ *Man Bhari v. Nannidh*, 1. L. R., 4 All., 40; *Balmakund v. Bhagwan Das*, 1. L. R., 16 All., 135; *Nand Kishore v. Suraj Prasad*, 1. L. R., 20 All., 392; *Bai Rambai v. Bai Mani*, 1. L. R., 28 Bom., 224; *Dharmodas v. Nistarini*, 1. L. R., 14 Cal., 440.

² *Tadman v. D'Epinuil*, 20 Ch. D., 758.

³ *Belding v. Read*, 8 H. & C., 955; *Holroyd v. Marshall*, 10 H. L. C., 191; *Tadman v. D'Epinuil*, 20 Ch. D., 758.

⁴ *Srinath v. Sarvamangala*, 10 W. R., 488; 2 B. L. R. (A. C.), 144; *In re Richards*; *Shenstone v. Brock*, 26 Ch. D., 541.

letter thus : "Herewith I enclose cheque for £37,100 which you can receive at the bank first dividend . . . made this day." On the 18th of March he again wrote to plaintiff, as follows :—"I have yours in reply to the receipt of dividend—long may you live to enjoy it ;" and in the same letter, after referring to the meeting of the 17th January, he further said :—"Well, when I got in, I openly at once asked the question in the presence of" (four persons whom he named), "I was about to give my two daughters one share each, and which is the way to do it? They were all pleased. It was entered in the minutes of the book." It was held that the above expressions in letters, signature of minute, and gift of dividend, did not amount to anything more than a desire to make the gift of the shares, and that a mere desire or declaration however unequivocally expressed could not be allowed to take the place of a completed gift.¹ Similarly in another case where the donor soon after the birth of his son, purchased a pipe of wine for his son, and had it bottled and laid down in his cellar, and was thenceforth kept intact and was known in the family and amongst the donor's friends as the son's wine, it was held that these facts did not disclose sufficient evidence of an intention to make an immediate present gift of the wine to the son.² Where the donor assigns by a voluntary deed "all the personal estate, whatsoever and wheresoever" the donee is entitled to receive not only the property in the possession of the donor, but also such property as the donee may have possessed to secure the payment of advances made to the donor.³

874. The words conveying the gift should be sufficiently definite, but if they are indefinite, they will be construed to convey all the interest which the donor was then able to pass, unless it appears otherwise, as where by the purpose of the gift it appears that only a life interest was intended. The presumption in the case of a gift by or to a Hindu widow is that it does not enure beyond her own lifetime.⁴ But where the donor is capable of passing an absolute estate, and does so in an unmistakable language, there is of course nothing against a Hindu widow's acquiring an absolute estate. Thus where the gift was made in the following terms : "I have hereby given to you to be enjoyed as *stridhanam* after my death 2,320 *fanams* out of 6,000 *fanams* who remain as *kanam* on the land The proportionate rent on 2,320 *fanams* is 365 *paras*. This quantity of paddy . . . shall be enjoyed by you and your sons and grandsons hereditarily by receiving the same from my sons," it was held that the gift was enjoyable in perpetuity.⁵

Thus in a case which went up before the Privy Council their Lordships after stating the facts remarked : "It is not necessary

¹ *Heartley v. Nicholson*, 19 Eq., 238.

² *Richardson v. Richardson*, 8 Eq., 686 ;
see also *Richards v. Delbridge*, 18 Eq., 11.

³ *In re Ridgway*, 15 Q. B. D., 447.

⁴ *Kollany Koer v. Luchmee Pershad*, 34
W. R., 305 ; *Ganpat Rao v. Ram Chandra*,

I. L. R., 14 All., 206 ; *Dantuluri v. Malapudi*, 2 M. H. C. R., 860 ; *Sri Braja Kisora v. Sri Kundana*, 9 M. L. J. R., 157, P. C. ;
Dawlat v. Nandlal, 9 C. P. L. R., 95.

⁵ *Krishna Ayyan v. Pythianatha*, I. L. R.
18 Mad., 252.

to decide whether the Transfer of Property Act enacts what was unquestionably the law before. The rule of law was that indefinite words of grant were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention. It is a question to be decided when it arises, whether the framers of the Act have not consciously or otherwise so expressed themselves as to lay down a more positive rule in favour of absolute gifts. In this case the intention must be collected from the whole of the instrument. The words, 'I put a stop to my interest (in those *taluqs*) and withdraw my enjoyment thereof, and I make them over to you,' must be read in connection with the words which precede them—'in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support by having the property under your authority and control.' It appears to their Lordships that the indefinite words of grant must be limited by the purpose of the gift, and that it was Romasunderi's intention that Ruttonmoni should take the property only for her life."¹ And it is a rule of equitable construction, that where the words used are ambiguous, uncertain or indefinite, they should be construed most strongly against him, who could have avoided using them. "It is a maxim of law," says Coke, "that every man's grant shall be taken by construction of law most forcibly against himself."² And in construing a grant it is not competent to admit any oral evidence as to the intention or the meaning of words which must be construed as they stand.³ But evidence of surrounding circumstances, reflecting upon the donor's intention is always admissible.⁴ The evidence excluded is the direct evidence with a view to explain the surmised or alleged intention of the donor.⁵ And since the object to be arrived at is the real intention, of the donor, it is immaterial whether the deed is designated as a will, if it substantially makes a gift of the property, in which case, it should be treated as such in spite of its erroneous designation.⁶ And, so where from the whole tenour of a deed, it appeared that the real intention of the donor was to pass all his property, qualifying words used in the deed were held not to control its operation.⁷ A gift may be made conditionally or it may be made contingent upon the happening of an event. Thus in a case a *karar* executed to the father of *S.* a minor grandson of the executant after reciting that the executant had appointed *S.* to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to *S.* on his

¹ *Kalidas v. Kanhaya Lal*, I. L. R., 11 Cal., 121 (131), P. C.

² Co. Litt., 138a, 139b; see also per Lord Abinger, C. B., in *Stephens v. Frost*, 2 Y. & C. Ex., 209; *Fowle v. Welsh*, 1 B. & C. at p. 25.

³ *Collector of Moorsheadabad v. Anand Nath*, W. R., F. B., 112.

⁴ *Preo Nath v. Madhu Sudan*, I. L. R., 25 Cal., 603; *Ramjibhai v. Oghore Nath*, ib., 401.

⁵ *Collector of Moorsheadabad v. Anand Nath*, W. R., F. B., 112.

⁶ *Hurro Soonduree v. Chander Mahinee*, 3 W. R., 200.

⁷ *Kaler Doss v. Khiroda Soonduree*, 16 W. R., 300.

attaining majority and proceeded as follows :—"If the said *S.* shall have descendants, neither your male descendants nor any one else shall have any interest in any of the property hereinmentioned. If the said *S.* happen to be without descendants, the male offspring of my daughter, *K.*, your wife, shall enjoy the property equally, but no others shall have any interest therein ; such is the *swatantra karar* executed with my free will and pleasure." *S.* attained his majority, but died without issue. His elder brother having sued for possession of the property under the above clause, it was held that since the plaintiff was a person capable of taking subject to the life-interest, at the time when the gift was made, he was entitled to succeed.¹

There is no objection to one part of an instrument operating *in presenti* as a deed and another *in futuro* as a will.²

§75. Creation of a trust.—A gift is distinguishable from a loan in that it is made without consideration. A condition attaching to a gift must not be regarded as its consideration. A man may transfer his property without consideration in one of two ways ; he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership in which case the person who by those acts acquires the property takes it beneficially or on trust as the case may be ; or the legal owner of the property may, by one or other of the modes recognized as amounting to a declaration of trust, constitute himself a trustee and without an actual transfer of the legal title may so deal with the property as to deprive himself of the beneficial ownership and declare that he will hold it from that time forward in trust for the other person.³ Although a gift through the intervention of a trust is legal in this country and has been recognized in several cases,⁴ it is so apt to be made the pivot for perjury and dishonest claims, that evidence given in support of it, would have to be scanned with the greatest scrutiny. Thus it was observed by Sargent, C. J., in a case : "The equitable doctrine of the transfer of ownership by acknowledgment of trust, when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution ; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties, speaking as to conversations which took place seventeen years ago without the corroboration derived from other evidence pointing irresistibly in the same direction, would be to introduce a most dangerous mode of appreciating evidence in this

¹ *Manjamma v. Padamanabbaayy*, 1. L. R., 12 Mad., 598.

² *Seth Chand Mal v. Lachmi Narain*, A. W. N. (1900), 1, following *Cross v. Cross*, 1. L. R., 4 Q. B., 714.

³ *Richards v. Dalbridge*, 1. L. R., 18 Eq., 11 (14).

⁴ *Jamsetji v. Sonabai*, 3 B. H. C. R., 180 ;

Morbai v. Perosbai, 1. L. R., 5 Bom., 269 ; *Hirbai v. Jan Mahomed*, 1. L. R., 7 Bom.,

229 ; *Bhaskar v. Sarasvatibai*, 1. L. R., 17 Bom., 486 ; *Vencatachella v. Thathammal*, 4 M. H. C. R., 460 ; *Ganpati v. Savithri*, 1. L. R., 21 Mad., 10 ; *Golam Yassin v. Official Trustees of Bengal*, 1. L. R., 8 Cal., 387.

country, and would offer a direct encouragement to perjury."¹ So again in another case the necessity of precision and detail in this respect was for similar reasons insisted on.² It has been accordingly held that in order that the owner of a fund may constitute himself a trustee of it, he must either expressly declare himself a trustee, or must use language which, when taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise dominion and control over it exclusively in the character of a trustee. From the single circumstance that an account has been opened by a father in his books in the name of his son, in which money is credited to the son, no presumption can be raised in India, that the father intends to create a trust in favour of his son, of the sums appearing in the account.³ And from the fact that the practice of making *benami* purchases is so rife in this country no presumption can arise either way as to whether the property purchased in the name of a relation is the property of the person who has actually supplied the funds or the nominal owner.⁴ No doubt in such a case, initially the person who asserts that the ostensible owner is not the real owner will have to show that he it was who had really provided the funds, but once this is proved the subsequent acts done in the name of the nominal owner will be explained by reference to the real transaction. The same motive which dictated an ostensible ownership, would naturally dictate an apparent course of dealing in accordance with such ownership.⁵

876. Who may be the donee :—A gift may be made to any person whether major or minor, animate or inanimate, and if the donee himself is incompetent to accept the gift, it may be accepted by any one on his behalf. A gift may be made to an idol⁶ as of Shiva,⁷ which is regarded as a juridical person and on whose behalf the gift may be validly accepted by the priest or manager of the temple. But in such a case the gift must be directed to an object which besides being in existence,⁸ is not too vague and uncertain as, *dharam*, i.e., religious or charitable purposes, since the object of such a gift can only be attained by the creation of a trust which cannot be administered effectively. Unless the object is definite and specific⁹ "it is a maxim," says Lord Eldon, "that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be

¹ *Hirbai v. Jan Nahomed*, I. L. R., 7 Bom., 229 (251, 252).

² *Ganpati v. Savithri*, I. L. R., 21 Mad., 10 (14).

³ *Ashabai v. Haji Tyck*, I. L. R., 9 Bom., 115.

⁴ *Chunder Nath v. Kristo*, 15 W. R., 257; *Mayne's Hindu law*, § 401.

⁵ *Mayne's Hindu law*, § 401; *Rohce v. Dindyal*, 21 W. R., 257; *Subiman v. Mehndi Begum*, I. L. R., 25 Cal., 473; *Dagon v. Balvant*, I. L. R., 22 Bom., 820.

⁶ *Bippro Pershad v. Kenat Dayee*, 2 W. R., 165; 5 W. R., 83; *Narain Pershad v. Roodur Narain*, 2 Hay., 490; *Manohar v. Lukshmi-ran*, I. L. R., 12 Bom., 247; *Bhuggobutty v. Gooroo Prosonno*, I. L. R., 25 Cal., 112.

⁷ *Ganapati v. Savithri*, I. L. R., 21 Mad., 10 (14).

⁸ *Bai Motivaboo v. Bai Mamooabai*, I. L. R., 21 Bom., 709, P. C.; *Upendra Lal v. Hem Chandra*, I. L. R., 25 Cal., 406.

⁹ *Runchordas v. Parvati Bai*, I. L. R., 22 Cal., 725, P. C.

under that control so that the administration of it can be reviewed by the Court or if the trustee dies, the Court itself can execute the trust, a trust therefore which in case of maladministration could be reformed and a due administration directed, and then unless the subject and objects can be upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration."¹ Where the gift is dedicated to an idol, it must be regarded as a gift appropriated to the particular image and not to any substituted image, since according to Hindu law, when an idol has once been consecrated by appropriate ceremonies, the deity of which the idol is the visible image is believed to reside in it, and which therefore marks it with an individuality which allows of no substitution.² A gift may be made to a class, provided the members thereof are existing at the time. If therefore some of them are unborn at the time of the gift, it will take effect as to the former, and be void as to the latter.³ And generally it may be laid down that where there is a gift to a class, some of whom are or may be, incapacitated from taking, because not born at the date of the gift or the death of the donor, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking.⁴ A gift addressed to Brahmans as a class is not however necessarily bad, although if the grantor create a secular estate with a religious motive, the grant will not stand on the same footing with a religious endowment, and will not be exempt from the rule as to perpetuities.⁵ A gift may be made to a corporate body, a charity, or other objects of public benevolence. Alienation of property made in favour of a person in discharge of an obligation due to him may or may not be regarded as a gift according to the nature of the obligation. If the transfer is dictated by gratitude affection or other similar emotions, it is certainly a gift, but if on the other hand the transfer is made virtually in payment of a debt due to the transferee, it can then no longer be regarded in that light. Thus, for example where in a case certain negotiable securities were stolen from the defendants by their manager, and came into possession of the plaintiffs for value, without notice of any fraud, and subsequently the manager obtained the securities from the plaintiffs by fraud, and restored them to the defendants who did not know that the securities had been out of their possession, a portion of the restored securities being not the bonds actually stolen, but bonds of a like kind and value, it was held, that, in the absence of evidence to the contrary, it should be

¹ *Morice v. Bishop of Durham*, 9 Ves., 399; 10 Ves., 522, cited and followed in *Ruckardas v. Parbati Bai*, 3 C. W. N., 631, P.C.

² *Doorga Pershad v. Shoo Proshad*, 7 C. L. R., 378.

³ *Rai Bishen Chand v. Amalda Koer*, I. L. R., 6 All., 500, P.C.

⁴ *Ramlal v. Kanai Lal*, I. L. R., 12 Cal., 608; *Soudaminy Dass v. Jogesh Chandra*, I. L. R., 2 Cal., 262; *Kherodemoney Dass v. Doorgamoney Dass*, I. L. R., 4 Cal., 455, questioned.

⁵ *Anantha v. Nagannthu*, I. L. R., 4 Mad., 200.

presumed that the defendants accepted the securities in discharge of their manager's obligation to restore them, and that they could not be therefore regarded as mere donees, but rather *bona-fide* holders for value and as such entitled to retain them.¹ A child in embryo is a "person" to whom a gift may be validly made.² A gift made to the donee in virtue of his being the "adopted son" of the donor, would for its validity depend upon the consideration whether the term defines the reason or motive for the gift, or is used as descriptive merely.³

877. Valid acceptance.—The gift must be accepted by either the donee personally or some one on his behalf. The acceptance must be made while the donor is still capable of giving and during his lifetime. It is therefore unnecessary that the acceptance should be made immediately. On the other hand, it may be made at any time provided only that in order to be valid it complies with the two conditions above laid down. And it has been held in England that in the absence of anything to the contrary consent is always to be presumed until the donee signifies his dissent, even though the donee is not aware of the gift.⁴ The presumption of acceptance in such cases is no doubt artificial, but it is founded on human nature; for a man may be fairly presumed to assent to that which is clearly beneficial to him.⁵ But in England the same presumption is extended even to the case of an onerous gift.⁶ Hence it follows that an offer of gift once made cannot be revoked, until the intended donee has signified his refusal. And since the presumption in favour of acceptance by the donee is independent of the actual knowledge of it by the latter, it follows that an offer once made cannot be recalled even before it has been communicated to the donee.⁷ But a gift cannot on that account be regarded as complete, since the acceptance that is required to complete it is not merely a legal presumptive acceptance, but a positive acceptance which *must be made* by the donee or some one on his behalf. But in a case of disputed acceptance, the presumption of law is often of great value, inasmuch as coupled with it very little more evidence would be sufficient to furnish the requisite degree of proof of the positive acceptance deemed necessary to complete the transfer. And it may be a question whether in view of the more positive language used in the section, the doctrine of presumptive acceptance before

¹ *London and County Bank v. London and River Plate Bank*, 21 Q. B. D., 535.

² *Tagore v. Tagore*, 9 B. L. R., 877 (897), P. C.; but see *Ramanna v. Venkata*, 1 L. R., 11 Mad., 246.

³ *Fanindra Deb v. Rajeshwar Das*, 1 L. R., 11 Cal., 468, F.A.C.

⁴ *London and County Bank v. London and River Plate Bank*, 21 Q. B. D., 535 (541); *Xenos v. Wickham*, 1 L. R., 2 H. L. C., 296 (315); *Standing v. Bowring*, 27 Ch. D., 841; 31 Ch. D., 291.

⁵ Per Lindley, L. J., in *London and County Bank v. London and River Plate Bank*, 535 (542); *Bai Kishal v. Lakshmana*, 1 L. R., 7 Bom., 452 (454).

⁶ *Siggers v. Evans*, 5 El. and Bl., 367; 21 L. J., Q. B., 305.

⁷ *Butler and Banker's case*, 8 Rep., 256; *Thompson v. Leach*, 2 Vent., 198 (208); *Siggers v. Evans*, 5 El. & B., 367; *Standing v. Bowring*, 31 Ch. D., 282; *Semble in Bai Kishal v. Lakshmana*, 1 L. R., 7 Bom., 452.

expounded can be regarded as anything more than a rule of evidence¹ in this country. There can be no doubt that under the Indian Contract Act a proposal does not pass out of the hands of the proposer unless it is accepted,² and if the analogy between a contract and a gift be not fallacious it would seem to follow that a gift may be revoked at any time before it is actually accepted.³

The donee when he accepts the gift himself must be *sui juris*, otherwise some one else must accept it for him. The latter must be a person who is duly empowered to act for the donee, and whose acts shall bind him. A father and in his absence the mother of a Hindu is competent to accept a gift made to his minor son.⁴ A guardian, trustee or the curator may accept a gift for the ward.

Where a gift is made to two donees, and gift to one is invalid, the other would take the whole estate.⁵ Where the gift is made to the donee and thereafter to his son, and the latter predeceases the original donee, he has not acquired a vested interest in the gift upon which his guardian could afterwards maintain a suit.⁶

The donee is not bound to accept the gift in the form it is offered to him. He may of course if he chooses accept it as such, or may make a counter proposal to take it as a loan :—"It requires," says Mellish, L. J., "the assent of both minds to make a gift as it does to make a contract. No doubt you may infer that a person has assented to that which is obviously for his benefit on slighter evidence than would be required to shew that he assented to a contract which may be to his prejudice ; but it is by no means uncommon, particularly in the case of money transactions between relatives, that the party intended to be benefited may prefer to receive as a loan what has been offered as a gift. Surely it is not an extraordinary thing that a man should offer to make a present to his friend and that the friend should say, in answer, 'I am much obliged to you for the money, and it is of the greatest possible use to me ; but I cannot take it as a gift, I can only take it as a loan.' If the person who had advanced the money acquiesces in this, the ultimate agreement would be for a loan, and the transaction would be one of loan, and not of gift, although I quite agree that the person who sent the money might in his turn say : 'I do not choose to have it taken as a loan ; you must take it as a gift or not at all.' In that case if the person to whom the money was sent did not return it, but kept it, of course it would be a gift."⁷ Acceptance then need not be explicit. It may be inferred from conduct or other acts shewing an acquiescence on his part. Where as a part of the same transaction two gifts are made to the same person, and one of them is onerous, the donee cannot repudiate

¹ See *per Mellish, L. J.*, in *Hill v. Wilson*, L. R., 8 Ch., 888 (896).

² Sec. 6, Act IX of 1872.

³ See sec. 126, post.

⁴ *Ramanna v. Venkata*, I. L. R., 11 Mad., 246; *Murari v. Tayana*, I. L. R., 20 Bom., 286.

⁵ *Nandi Singh v. Sila Ram*, I. L. R., 16 Cal., 677, P. C.; following *Humphrey v. Taylor*, Amb., 183.

⁶ *Srinivasa v. Dandayulapante*, I. L. R., 12 Mad., 411.

⁷ *Hill v. Wilson*, L. R., 8 Ch., 888 (896).

the onerous gift and accept the rest. If, however, the two gifts are distinct, the donee is entitled to take one and disclaim the other. The question in each case depends upon the donor's intention, but *prima facie* the fact that there is only one gift is an indication of an intention that the donee shall either take the whole or none at all.¹

Acceptance of possession of the thing gifted is strong evidence of acceptance of the gift, unless it appears that the donee had accepted it merely for examining and trying it.²

878. Acceptance when to be made.—Acceptance must be made during the lifetime of not only the donor, but also the donee, for if the donee dies before acceptance the gift is void, and if the donor has died before, it is incomplete. Where, however, the donor after relinquishing the subject of the gift so far as he could, dies, the mere fact that by an omission his signature could not be endorsed on the deed would not invalidate it.³ And so by parity of reasoning, a gift made in the form of a cheque drawn on the bankers of the donor is complete, and if therefore the bankers refuse to honour the draft and in the meantime the donor dies, his executors cannot refuse to make payment.⁴ But no doubt if in such a case the banker had no funds on the day the cheque was drawn, then there would have been incompleteness in the gift. The *rationalis* of all these cases seems to be that where the transaction is *inter partes* complete, it cannot be defeated by the neglect of duty or wrongful act of a stranger, which the parties thereto had not contemplated. Hence it has been held that since offer and acceptance must alone be made during the lifetime of the parties, a gift is not invalid merely because the document by which it is effected has been registered after the death of the donor.⁵

123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

¹ *Guthrie v. Walbond*, 23 Ch. D., 578 (577).

² Sec. 118, Indian Contract Act (Act IX of 1872).

³ *Man Shari v. Nannida*, I. L. R., 4 All., 40.

⁴ *Bronley v. Brunton*, 5 Eq., 275.

⁵ *Hardi v. Ramlat*, I. L. R., 11 All., 319, F. B.; *Nand Kishore v. Suraj Prasad*, I. L. R., 20 All., 392.

879. Analogous law.—This section which in its wording closely corresponds with sec. 54, is directed¹ to be read as supplemental to the Indian Registration Act.² It does not therefore apply to areas in which the latter Act is not in force. Moreover it has no application to gifts made in accordance with the Mohammedan law, but it applies to gifts made by Hindus in spite of the rule of Hindu law dispensing with both writing and registration.³ A gift is also required to be registered under sec. 17 (d) of the Indian Registration Act.⁴ In regard to moveable property the section enacts the same rule as obtains in England, where a gift of moveable property can only be made by registration or delivery.

Secs. 90 to 94 of the Indian Contract Act lay down rules as to the way in which goods sold may be delivered.

880. Principle.—The gift of immoveable property irrespective of value must be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. Delivery of possession is neither essential, nor does it affect a gift in any way. With the registration of a duly executed deed the property vests in the donee. But a gift of moveable property does not require registration but delivery of possession is essential, but if the gift is effected by a registered instrument, delivery is then no longer essential, the deed being by itself sufficient to pass the property. The result is that a registered instrument is in all cases sufficient to convey the gift whether of moveable or of immoveable property. In the case of moveable property, however, the donor has the option of either perfecting his gift by a registered document, or by delivery of possession. The section has abrogated the rule of Hindu law by which possession was regarded as necessary to complete the gift. On the other hand it leaves the Mohammedan law unaffected with the result that under it possession must still in all cases be transferred, even though the gift may be registered. A *donatio mortis causa* is also excepted from the rule of the section, and may be made uncontrolled by the other provisions of this chapter.

881. Meaning of words.—“For the purpose of making gift . . .” implies that unless the deed of gift is registered the transaction is inchoate. “Registered instrument” as defined in sec. 3, para. 4. The term “must” used in the first paragraph means that the gift cannot be effected otherwise than by the execution of a registered instrument. The word “may” used in the second paragraph shows that there are two effective modes of making a gift, viz., by a registered instrument, or by delivery of possession.⁵

882. Effect of registration.—The general effect of compulsory registration for the first time introduced by the section has been discussed before. The section in its wording closely

¹ By sec. 2, Transfer of Property Amendment Act (Act III of 1885).

² Act III of 1877.

³ Sec. 129, *post*.

⁴ Act III of 1877.

Dharmadas v. Nistarini Dasi, I. L. R., 14 Cal., 446 (449).

follows the lines of s. 54, and there is so much common between the two sections that in neither case is possession deemed requisite if the transfer is effectuated by means of a registered instrument. Prior to the passing of the Act this was by no means the case. Under Hindu law there are cases to shew that a gift without

(1) On immoveable property.

delivery was regarded as a *nudum pactum*, an incomplete gift which could not be legally enforced, even though the gift may be registered.¹ But by the passing of the Act, the law has been exactly reversed, for now, a gift cannot be regarded as complete unless it is registered, the delivery of possession being immaterial.² For it cannot be said that the section is inexhaustive, in the absence of which while prescribing one mode of transfer it necessarily excludes the other well recognized forms, since it is a principle of law that when a particular form of transfer is prescribed by law, a transfer in another form is inefficacious.³ The registration of a gift need not necessarily be made during the lifetime of the parties. Under the last section offer and acceptance alone have to be made during the parties' lifetime, and if it were the intention of the Legislature, to exclude *post-mortem* registration, it would have assuredly provided that for the purpose of making a gift of immoveable property, the transfer must be effected by an instrument signed by or on behalf of the donor, attested by at least two witnesses, and registered in the lifetime of the donor.⁴ When it is said that the gift is registered, it is of course intended that it should be duly registered by a competent officer under the provisions of the Indian Registration Act.⁵ Hence, it would appear, that if after executing the deed, the donor recants and refuses to register it, the gift is none the less complete and the document may be compulsorily registered.⁶ In Madras, however, it has been held⁷ that the registration of a gift contrary to the wishes of the donor is void, but it is submitted that this view is manifestly unsound, for the Act makes no distinction between the efficacy of a document registered on admission, and that registered by compulsion.⁸ Indeed the

¹ *Harjivan v. Naran*, 4 B. H. C. R. (A. C.), 21; *Bank of Hindustan v. Premchand*, 5 B. H. C. R. (A. C.), 83; *Vasudev v. Narayan*, 1. L. R., 7 Bom., 131.

² *Dagaj Dabes v. Mothura Nath*, 1. L. R., 9 Cal., 864; following *Krishto Soondery v. Ranees Krishto*, Marsh., 367; *Kalidus v. Kanhaya Lal*, 1. L. R., 11 Cal., 121; *Dharmodas v. Nistarini Dasi*, 1. L. R., 14 Cal., 446; *Ramchandra v. Runjit Singh*, 1. L. R., 27 Cal., 243. But contra in *Virapaxappa v. Muniappa*, 2 Bom., 1. R., 69, in which it has been held that a deed of gift though registered if unaccompanied by possession is not sufficient to give a good title against the donor unless there be a valuable consideration. To the same effect see *Krishnaji v. Paramasi*, C. P. Sel. Cas. (1890), No. 23;

Bapu v. Silaram, C. P., Sel. Cas. (1890), No. 24; *Dhuria v. Kudhi*, 1 C. P. L. E., 41; *Govinda v. Malkari*, 2 C. P. L. R., 37; *Soni v. Pandram*, 5 C. P. L. R., 68.

³ *Dharmodas v. Nistarini Dasi*, 1. L. R., 14 Cal., 446; *Kali Das v. Kanhyalal*, 1. L. R., 11 Cal., 121; *Bai Rambai v. Bai Mani*, 1. L. R., 23 Bom., 234.

⁴ *Merbai v. Perasbai*, 1. L. R., 8 Bom., 268 (377).

⁵ *Nand Kishore v. Suraj Prasad*, 1. L. R., 20 All., 892; following *Hardel v. Ramlal*, 1. L. R., 11 All., 119, F. B.

⁶ See sec. 3.

⁷ *Ramamirtha v. Gopala*, 1. L. R., 19 Mad., 425.

⁸ Secs. 74, 75, Indian Registration Act (Act III of 1877).

Registration Act treats both the documents alike, and were it the intention of the Legislature to exclude documents compulsorily registered, surely the section could have provided against the validity of the documents so registered.

The registered document must be signed either by the donor, or by some one on his behalf. The latter must necessarily be either his agent or such other person as can competently sign for him. The attesting witnesses must attest to the execution, which means that they must be present when the document is being signed by the donor. They must at least satisfy themselves that he knows its contents and accepts its terms.¹ Affixing signature to a document by the executant is no doubt *prima facie* evidence of its execution, but it may be rebutted, as by shewing that the executant was at that time *non compos mentis*, or that he signed it under the pressure of undue influence, or that being of dull intellect he was given no time to examine it, and generally it may be premised that any circumstance which is sufficient to avoid a contract is *a fortiori* sufficient to avoid a gift.

888. In regard to the law relating to gift of moveable property, the rule here has been brought on the line with the English law, under which a gift of chattels may be made either by deed or actual delivery. In England from the days of Bracton seisin was regarded as a most important element of the law of property in general. It was regarded as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another was equally regarded as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal.² "A true and proper gift or grant," says Blackstone, "is always accompanied with delivery of possession and takes effect immediately." But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract and this a man cannot be compelled to perform."³ And so in a leading case Lord Esher, M. R., has said: "The proposition before the Court on a question of gift or not is, that the one gave and the other accepted. The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word, without giving; the other cannot accept then and there such a giving

¹ Venkatesh v. Baba Subbaya, I. L. R., 18 Bom., 44; Ramayyar v. Shanmugam, I. L. R., 15 Mad., 70; Girindra Nath v. Bejoy Gopal, I. L. R., 36 Cal., 346; Abdul Kasim v.

Salimun, I. L. R., 27, 190.

² Select Pleas in Manorial Court (published by the Selden Society), p. 142.

³ Comm. II, 441.

without then and there receiving the thing given."¹ And the same view was enunciated by the Privy Council in a case decided in 1869.² But under the law as now enacted a gift of chattels may be made by either a registered instrument without delivery, or in any other case only when accompanied by delivery. Of course, when there has been a gift, possession would necessarily have to be given, for the gift that is to be made is not of a document, but the property itself. But when the gift is registered, the law dispenses with contemporaneous possession which is otherwise still essential. With the execution of the deed the property is vested in the donee. He becomes its owner. His title is complete, and on it he can maintain an ejectment if his possession is delayed. Thus in a case where one *K*, a servant in the employment of the East Indian Railway Company, was recommended by the Traffic Manager a bonus in consideration of long and good services, and the recommendation being sanctioned, the amount of the bonus was received by the District Paymaster. But before payment to *K* the money was attached in execution of a decree obtained against him by *J*. It was held that inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July 1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery, and that as there had been no such delivery as completed the transfer, the money was not at *K*'s disposal, and he could not have enforced payment, and that therefore it could not be attached.³

384. Delivery how made.—The section directs that the delivery contemplated by the section shall be made in the same manner as goods sold may be delivered. The reference is to the corresponding provisions of the Indian Contract Act which enacts that delivery of goods may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorized to hold them on his behalf.⁴ A delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer.⁵ And a delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in the goods, as a delivery of the whole, but a delivery of part of the goods with an intention of severing it from the whole, does not operate as a delivery of the remainder.⁶ Generally speaking the subject of gift must be either in the possession of the donor or the donee or of a third person, who may or not be the donor's agent. The usual mode of delivering a thing in the donor's possession is by transferring it bodily to the donee. Thus if *A* give to *B* a horse, and cause or permit

¹ *Cochrane v. Moore*, 25 Q. B. D., 57 (76);

Irone v. Smallpiece, 2 B. and A., 551, dissented from.

² *Raja Sahib Prahlad Sen v. Budhu Sing*, 2 B. L. R., p. 111, P. C.

³ *Janki Das v. H. L. Ry. Co.*, 1. L. R., 6

All., 684.

⁴ Sec. 90, Indian Contract Act (Act IX of 1872).

⁵ *Ib.*, sec. 91.

⁶ *Ib.*, sec. 92.

it to be removed from *A*'s stable to *B*'s, the removal to *B*'s stable is a delivery.¹ So again, if *A* give to *B* certain specific goods that are locked up in a godown, delivery may be effected by making over to him the key of the godown, in order that he may get the goods.² In the latter case, there is no actual delivery, but from the fact that the delivery of the key symbolizes his renunciation of his dominion over the subject of gift, there is constructively a delivery which the law regards as sufficient. The delivery of the key, said Kekewich, J., in a case, "is the symbol of possession where the possession itself is practically impossible, a man being unable to carry about with him, or, at any rate, to conveniently move to his own warehouse adjoining, a large quantity of timber, the delivery of a key giving exclusive control is regarded as delivery of possession itself."³ But the delivery of the key in order to move constructive possession must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key. There can be no delivery if the thing is given for trial,⁴ or subject to any other condition inconsistent with the exercise of the right of ownership. Where the subject-matter of the gift is on account of its size capable of manual delivery and actual delivery might and could have been made, it will be always a question why the donor refrained from making an actual delivery. If on the other hand, from the nature of the property, actual delivery is not possible, and such delivery as could be made under the circumstances, was made, the Court will not require more of the donor. Mere permission to the donee to take away the subject of the gift is by itself not a sufficient evidence of delivery, but there may be circumstances which, when taken with the permission, may amount to it. The packing of goods in the donee's boxes or clothes is evidence of, but does not constitute, a delivery. A delivery of a part of the goods is similarly no more but evidence of the delivery of the whole.⁵ The question of delivery is always a question of fact and is to be determined by reference to all the surrounding circumstances, which must be looked at in order to see if there has been a virtual change of possession as well as a change of ownership.⁶

885. Where the subject of gift is already in the possession of

(1) Where property is in donee's possession.

the donee, transfer of actual possession is then of course no longer possible. The donor then can only make a declaration that he

has renounced his ownership and then leave the donee in possession of the thing. And this has been held to be sufficient to constitute delivery. "If the possession," says Wills, J., "is changed in consequence of a verbal gift—as where the possession had been in one capacity up to the time of the gift, and from that time it is held

¹ Indian Contract Act, s. 90 III (a).

² Indian Contract Act (Act IX of 1872), sec. 90, III. (c).

³ *Hilton v. Tucker*, 20 Ch. D., 680.

⁴ *Elphick v. Barnes*, 5 C. P. D., 321.

⁵ *Bunney v. Poyntz*, 4 B. & Ad., 568.

⁶ *Blenkinsop v. Clayton*, 1 Moo., 831; Addison on Contracts (9th Ed.), 524.

in another capacity—in this case as owner—I think that the gift is completed.¹ Hence, where some household furniture which was the property of the claimant's father, was in the possession of the claimant's husband with whom she resided, and the father, being at that time present with the claimant in the room where some of the furniture was, said: "I give you this furniture, it will be something for you," and then went away leaving the claimant in the room. There was no manual delivery of the furniture to the claimant, and after the gift the furniture still remained in the house where the claimant and her husband continued to live, it was held that there had been such a change of possession from the claimant's husband to the claimant, consequent upon the gift, as was sufficient to effectuate it.² Where, however, as in another case the words used were: "I will give you the plate of mine which you have," the gift is bad not because the plate was already with the intended donee but because the words import a promise rather than a present gift.³ There are several Indian cases in which the same view has been taken, words of present gift being alone sufficient to convert mere occupation of one kind into possession required to be made to the donee. Thus where in one case the donor said to a joint donee: "I have given you possession," of the property then already in physical occupation of the donees, the words were held to be sufficient to pass the property.⁴

886. Where the subject-matter of the gift is in the possession of a third person, delivery may be made by means of a tripartite agreement. Thus where *A* gives to *B*, 50 maunds of rice in the possession of *C*, a warehouseman. *A* gives *B* an order to *C* to transfer the rice to *B*, and *C* assents to such order, and transfers the rice in his books to *B*. This is a delivery in law by *A* to *B*.⁵

But the consent of the party in possession is by no means always necessary to complete a delivery. Thus where the donor made a present of a sum of money in the form of a cheque, the gift was held to be complete on the day the cheque was presented, although the banker had subsequently refused to honour it.⁶ This view is not inconsistent with that taken in a Bombay case where all that was held is that the vendor does not lose his lien for the price by an order to deliver given to the wharfinger unless the latter has attorned. That for all other purposes there is a change in possession seems to have been conceded in the case.⁷ At any rate this is clearly the outcome of the English Common law

¹ *Kilpin v. Ratley* [1893], 1 Q. B., 582 (585).

² *Kilpin v. Ratley* [1892], 1 Q. B., 582; see also *Cain v. Moon* [1896], 2 Q. B., 233.

³ *Irons v. Smallpiece*, 2 B. & A., 551; *Shower v. Pilck*, 4 Exch., 478; *Winter v. Winter*, 4 L. T. (N. S.), 689; *Alderson v. Peel*, 7 L. L. R., 418.

⁴ *Bai Kusal v. Lakhmana*, 1 L. R.,

7 Bom., 152; see also *Gamble v. Bhalaji*, 2 B. H. C. R. (A. C.), 150; (2nd Ed.), 147; *Nawab Mataka Jahan v. Deputy Commissioner, Lucknow*, L. R., 6 L. A., 63.

⁵ Sec. 90, III. (c), Indian Contract Act (Act IX of 1872).

⁶ *Bromley v. Brunton*, L. R., 6 Eq., 275.

⁷ *Le Geyt v. Harvey*, 1 L. R., 7 Bom., 501.

cases¹ relied upon in the Bombay judgment. Thus says Addison, in his work on contracts: "The delivery of the goods to the carrier operates as a delivery to the purchaser; the whole property immediately vests in him; he can alone bring an action for any injury done to the goods; and if any accident happens to the goods, it is at his risk."² The rule would seem only to apply to the case of common carriers and wharfingers who being regarded as agents of the public, would hold and act for the donee as soon as they have received an order of delivery from the donor. But the same rule would not hold good where the order is communicated to the private agent only. Thus in a case where the donor, a Railway Company, sent a certain sum of money by way of bonus to their paymaster, for payment to the donee, it was held that the order to pay was not equivalent to delivery for the money was not actually paid to the donee, and the paymaster had no authority from him to hold the money on his behalf.³ Where transfer is customarily made in a particular form, the rule as to delivery would be subject to it, since the Indian Contract Act itself excepts from its operation incidents of a contract or a usage or custom of trade not inconsistent with its provisions.⁴ Thus it is now a recognized custom to effect a transfer of Government securities⁵ or a banker's deposit receipt⁶ by indorsement which is alone regarded as sufficient to pass the property. Accordingly, there can be no effectual transfer by gift of such and similar securities without the donor's indorsement.⁷ An equitable mortgagee cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed, for his charge being untransferable he cannot transfer that which constitutes the charge.⁸ Where an assignment can only be made by writing, a transfer without writing would be of no avail. Neither the indorsement, nor the writing where necessary to effectuate a gift, should be made conditional. Thus an indorsement to the following effect: "I bequeath—pay the within contents to Simon Smith, or his order at my death," does not constitute a gift *inter vivos*, since the payee's expressed intention was to keep the ownership for life even though he had delivered the notes to the indorsee.⁹ A mere indorsement on a deed without delivery is ineffectual. Thus where the donor, an owner of ten Austrian bonds, made the following indorsement on five of them: "The first five of these Austrian bonds belong to and are *H D's* property," and locked up all the ten, making over

¹ *Farina v. Home*, 16 M. & W., 119; *McEwan v. Smith*, 2 H. L. C., 309; *Merchant Banking Co v. Phoenix Bessemer Steel Co.*, 5 Ch. D., 205.

² Addison on Contracts (9th Ed.), 625.

³ *Janki Das v. East Indian Railway Co.*, 1 L. R., 6 All., 684.

⁴ Sec. 1, para. 3, Indian Contract Act (Act IX of 1872).

⁵ *Merbai v. Peresbai*, 1 L. R., 5 Bom., 268 (276)

⁶ *In re Griffin; Griffin v. Griffin* [1890], 1 Ch., 406.

⁷ *Khursedji v. Pestonji*, 1 L. R., 12 Bom., 578.

⁸ *In re Richardson; Skillico v. Hobson*, 30 Ch. D., 896; following *Edwards v. Jones*, 1 My. & Cr., 226; followed in *Khursedji v. Pestonji*, 1 L. R., 12 Bom., 578 (577).

⁹ *In re Patterson; Mitchell v. Smith*, L. J., 33 Ch., 596; see for another similar case, *Cross v. Cross*, 1 Ir. L. R., Ch. D., 359.

the key of the box to the said *H D*, his house-keeper, it was held that as the donor had not actually transferred or delivered the bonds, the gift was incomplete.¹ Where a gift remains somehow incomplete it operates as no more than a promise or an agreement which the Courts, however, will not enforce.² A conveyance for consideration cannot afterwards be set up as a gift.³ And when after an alleged gift, the donee restored the control of the property to the donor, mere evidence of motive for the gift is insufficient to establish the donee's right to it.⁴

124. A gift comprising both existing and future property is void as to the latter.

Gift of existing and future property.

887. Analogous law.—This section may be regarded as only an explanation of sec. 122, which defines "gift" to be the transfer of certain *existing* property, moveable or immovable. The rule here enacted is in entire accord with the English law and the judgment of the Privy Council in which it was observed:—"How can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed in *futuro*, and upon the happening of a contingency of which the purchaser may claim a specific performance, if he comes into Court showing that he himself has done all that he was bound to do."⁵

888. Principle.—A gift of future property is void, and where a gift comprises both existing and future property it is void as to the latter. The reason for the rule is obvious. A gift of property not in existence is at best no more than a promise to be performed in *futuro*. And since a promise without consideration cannot be legally enforced,⁶ it follows that it is wholly inoperative, and one upon which the donee can make no claim. Similarly it has long been established in England that equity will not assist the donee of a bond to recover the amount of it, if the gift was made without consideration.⁷ The Court will not assist a volunteer by making effectual an incomplete gift.⁸

125 A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several of whom one does not accept.

¹ *Trimmer v. Darby*, L. J., 25 Ch., 424.

² *Edwards v. Jones*, L. J., 4 Ch. (N. S.), 163; *Weale v. Ollive*, 17 Beav., 252.

³ *Bridgman v. Green*, 2 Ves., 687.

⁴ *Jones v. Jaines*, 19 L. J. (N. S.), 809.

⁵ *Rajah Shih Prahlad v. Baboo Budhu*, 12 M. I. A., 375.

⁶ Sec. 25, Indian Contract Act (Act IX of 1872).

⁷ *Edwards v. Jones*, L. J., 4 Ch. (N. S.), 163.

⁸ *Weale v. Ollive*, 17 Beav., 252; *Wycherley v. Wycherley*, 2 Eden., 177; *Morris v. Burroughs*, 1 Atk., 401; *Heartley v. Nicholson*, 28 W. R. (Eng.), 374.

889. Analogous law.—The Privy Council have not applied the principle of this case to a gift by a Hindu. This section lays down a rule which would not hold good in the case of a testamentary bequest. Thus in sec. 93 of the Indian Succession Act¹ it is provided that “if a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.” And the illustration appended to the section exemplifies the rule as follows:—“The legacy is simply to *A* and *B*. *A* dies before the testator. *B* takes the legacy.” But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator’s property.”² Thus if a sum of money is bequeathed to *A*, *B* and *C*, to be equally divided among them, and *A* dies before the testator, *B* and *C* shall only take so much as they would have had if *A* had survived the testator.³ The lapsed share in such a case goes as undisposed of.⁴

This section is ill-drafted. The contingency clearly contemplated is where out of several donees *some* do not accept, in which case the gift is void as to the interest which those refusing would have taken, had they accepted. It was not intended to provide for the case of non-acceptance by only one out of several donees. It therefore appears that strictly speaking the section should have run thus: “A gift of a thing to two or more donees, of whom one or more does not or do not accept it, is void as to the interest which he or they would have taken, had he or they accepted.” Where all the donees do not accept, the gift would of course totally fail.

The section is again somewhat too narrowly worded, inasmuch as if literally construed its scope is limited only to cases where some of the donees do not *accept*, and not to cases where the gift to them it may be for any reason, *falls through*.

890. Principle.—The section is founded upon the rule that the donor must be presumed to intend to give to such donee no more than what he actually gives, and as a gift is personal to the donee, his failure to accept it renders the gift incomplete, and the other donee cannot therefore take what would have been a completed gift only if it were accepted by the person to whom it was addressed. The other donee cannot accept what has not been offered to him.

891. Hindu law how far different.—In an English case, however, Hardwicke, L. C., has laid down the contrary rule. He said: “If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole.”⁵ This case has been cited with approval and followed by the Privy Council in a case decided in 1888, and in which an absolute gift was made by the donor, a Hindu widow, in 1879 to her daughter

¹ Act X of 1865.

² *Ib.*, sec. 94.

³ *Ib.*, sec. 94, iii.

⁴ *Ib.*, sec. 95.

⁵ *Humphrey v. Tayleur*, Ambler, 138.

and her husband jointly. Sir R. Couch in delivering the judgment of the Privy Council followed the rule laid down by Hardwicke, L. C., observing that the principle did not depend upon any peculiarity in English law and was applicable to the deed of gift before their Lordships.¹

126. The donor and donee may agree that on the happening of any specified event which does not depend upon the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part; as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) *A* gives a field to *B*, reserving to himself, with *B*'s assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A*'s lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B*'s assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to *A*.

892. Analogous law.—In so far as the section allows the revocation of a gift on the happening of a contingency beyond the control of the parties, it does not introduce any new rule into the country. And in so far as it enacts that a gift may generally be rescinded for the same reason, *mutatis mutandis*, as a contract the section follows analogy of the civil law under which a gift was regarded as a branch of the law of contracts. A contract may be rescinded as provided in the following section of the Indian Contract Act² :—

19. "When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

¹ *Nandji Singh v. Sitaram*, I. L. R., 16 Cal., 977, P. C.

² Act IX of 1872.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of sec. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.¹

20. "A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact."²

29. "Agreements, the meaning of which is not certain, or capable of being made certain, are void."

62. "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."³

In saving the rights of a *bond fide* transferee from the donee, the section only follows the rule laid down elsewhere in several places in the Act, as for example in secs. 39, 40, 43, 50, 51 and 53.

A gift dependant upon the fulfilment of an illegal condition is void. Such conditions are enumerated in sec. 25 (*q. v.* §§ 156—160).

Chap. IV (secs. 35 to 38) of the Specific Relief Act⁴ should also be read in this connexion.

The law as to gifts and wills is exactly analogous, and in the subsequent discussion cases decided upon wills will be cited to illustrate the principle of gifts since the same rules apply to both.⁵

893. Principle.—A gift once made cannot be capriciously recalled by the donor, for a transfer by gift is as complete and binding on the parties when once completed, as any other form of transfer. At the same time it is but just that the donor should not be irrevocably tied down to his promise, but should be allowed to qualify his gift by conditions within reasonable limits, and to rescind it for reasons which would have justified him in rescinding it if it were a contract. But while the transferor may rescind his gift as against the donee who has either broken the condition, or otherwise overreached him, he cannot on that account affect the property which a stranger may have acquired *bond fide* and without notice from the donee. If it were otherwise there would

¹ Here follow four illustrations, not necessary for the purpose of the section.

² Two illustrations appended to the section are here omitted as being unnecessary.

³ Here follow six illustrations omitted as being unnecessary.

⁴ The three following illustrations are omitted.

⁵ Act I of 1877.

⁶ *Tagore v. Tagore*, 9 B. L. R., 877, P. C.; *Court of Wards v. Penkata Surya*, I. L. R., 20 Mad., 167 (175).

always be an insecurity attaching to titles acquired by transfers for valuable consideration, which would have the result of deterring purchaser and would ultimately lead to the prostration of commerce.

894. Meaning of words.—"On the happening of any specified event:" means a given event certain or uncertain. "Suspended or revoked:" On revocation the parties revert to the *statu quo ante*, but on suspension the relationship still continues. "Save want or failure of consideration:" This is because a gift is a transfer made voluntarily and without consideration.¹

895. Revocation of gifts.—This section generally lays down the rules subject to which a gift may be made, and those subject to which it may be revoked. A gift may be made subject to any condition whether it be a condition precedent or subsequent, provided only that its fulfilment does not depend upon the mere will of the donor. For indeed, if it were otherwise, the continuance of the estate in the donee would be wholly dependant upon the will of the donor. The condition to be enforceable must be agreed to at the time of the gift, for if it is unconditionally complete at the time it is made, the parties cannot afterwards import a condition.² But this, however, does not mean that the parties may not substitute a new gift for the one already complete. What is intended is that a new condition cannot be superimposed upon a transfer already made.

Where the gift is burdened with a certain condition it must be clearly expressed. Thus in a case where a grant proceeded thus: "Therefore, in consideration of the merits of the late Mir, the jaghir lands have been continued and affirmed heretofore, agreeably to the foregoing provisions, to the said Khans. They will cultivate the same, and keeping up a body of men, will keep off the incursions of the elephants, and attend to the safety of the tenants; and the produce, whatever may remain after expenses, they will appropriate with their children. It is required you will consider the said individuals fixed jaghirdars, and exempt them from any call for services and from all demands. You will not call for fresh *sanads* for every year." It was held by the Privy Council that since there was no express condition providing for resumption consequent upon the non-performance of the services the grant could not be on that account resumed. "The grant," observed their Lordships, "may be said to have been made *pro servitiis impentis et impendendis* partly as a reward for past, partly as an inducement for future services. Again, neither *sanad* contains any words which expressly import that the tenure shall cease if, and when any of the services cease to be performed. Such a provision is something very different from one which merely casts upon the grantee the performance of certain duties so long

¹ Sec. 122, *ante*.

² *Ram Sarup v. Bela*, I. L. R., 6 All., 818 (821), P. C.

as they are necessary. The former makes the grant determinable when there is no further occasion for the services. But, in the latter case, if the operation of any natural causes (as, *e.g.*, the progress of cultivation which has caused the wild elephants to cease out of the land) removes the necessity for the services, the grantee will hold the lands practically freed from the condition originally imposed upon."¹ Where a condition of service is annexed to a grant, and nothing more is said about its resumption in the case of the non-performance of the required service it cannot be as a matter of course assumed. As their Lordships observed commenting upon a case decided by the Sudder Diwani Adaulat:² "If it means that, whenever service enters into the motive or consideration for a grant, the grant will become void if for any reason the service ceases to be performed their Lordships think that the proposition is far too wide."³ But of course where the grant made is of an office, the performance of whose duties are remunerated by the use of certain lands, the case is quite different.⁴ Here the grant made being of an office, and the grant of land being only by way of remuneration and therefore ancillary thereto, as the grantor can dispense with the performance of service he can equally resume the grant which is given as a consideration for the performances of the service.

But there appears to be some distinction between a grant for services of a public nature, and one for services, private or personal, to the grantor. In the former case the grantor is not entitled to resume, while in the latter case he may do so, when the services are not required or when the grantee refuses to perform the services.⁵ A distinction also exists between the grant of an estate burdened with a certain service, and that of an office, the performance of whose duties is remunerated by the use of certain lands. In the former case it would seem that the grantor is not ordinarily entitled to redeem, even if the service is not required, if the grantee is willing and able to perform the services, while in the other case he may do so when the office is terminated.⁶ But even in such a case the grantor cannot terminate the office capriciously unless the grant is personal to the donee and is not of an hereditary character. In the latter case where the services are still required, and the grantee has a right to the hereditary office, he cannot be deprived of the land on the mere ground that the grantor prefers to appoint some one else to officiate.⁷ A grantor

¹ *Forbes v. Mir Mahomed*, 5 B. L. R., 529 (545), P. C.; 18 M. I. A., 498.

² *Bhugoo Raut v. Asim Ali*, S. D. A., 84.

³ *Forbes v. Mir Mahomed*, 5 B. L. R., 529 (545), P. C.

⁴ *Id.*, p. 544; *Lakshmi v. Chandri*, I. L. R., 8 Mad., 72.

⁵ *Sannyasi v. Salur Zemindar*, I. L. R., 7 Mad., 268; *Hurroobind v. Ramrutno*, I. L. R., 4 Cal., 67; *Breach Chunder v. Madhub Moches*, S. D. A. (1867), 1772; *Nil.*

money Singh v. Government, 18 W. R., 321; *Unde Rajaka v. Pemmarawany*, 7 M. I. A., 126; *Radha Pershad v. Budhu*, I. L. R., 22 Cal., 938 (941).

⁶ *Forbes v. Mir Mahomed* 18 M. I. A., 488 (464); *Lilinand v. Munorunjun*, 18 B. L. R., 124; *Radha Pershad v. Budhu*, I. L. R., 22 Cal., 938 (941).

⁷ *Krianaji v. Vitthal Rao*, I. L. R., 12 Bom., 80; *Bhimapaya v. Ramchandra*, I. L. R., 2 Bom., 422.

cannot give to persons not yet in existence, subject to a suspensive condition which may never arise. Thus where in a case in consideration of their past services, the grantees obtained, from the grantor a Raja, as a "perpetual wage" and as a means of future maintenance seven villages, out of which they were put in possession of three villages, the other four villages being withheld because the grantees "were being supported by (the profits derived from) three villages and by other means," but the grant further provided that "If ever in the time of my descendants you are not provided with the means of maintenance (by them) then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three abovementioned villages, and also of the four villages (now held) *khas* (by me), enjoy possession of them rent free from generation to generation." On the strength of this clause it was contended by the descendants of the original grantees that each successive Raja was under an obligation, either to maintain them or to give them the four villages in question. It was, however, held by the Privy Council that whether the deed be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all, or, as in the present case, for generations to come, or as a contract, not a mere personal contract but a covenant running with the Raj estate, and binding on its possessor,—in either case the covenant is ineffectual. "It was hardly contended," remarked their Lordships, "that a present grant to persons unborn, and who may never come into existence is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same objections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law."¹

A grant which could not have been revoked by a private grantor, can no more be revoked because it is made by the Government.² Thus for example where by a proclamation, known as Dunlop's proclamation, made in 1824, it was declared that the owners of land in the Ratnagiri District, on which teak and other forest trees were growing or should thereafter be grown should be the owners of these trees and might dispose of them at their pleasure without any claim on the part of the Government. In 1851, however, this proclamation was rescinded by a subsequent proclamation, which declared that the "Government resumed as regard to forest, all the seigniorial rights which it possessed previously to 1823." The High Court, however, held that the first proclamation could not be withdrawn by any subsequent proclama-

¹ *Chandi Churn v. Sidheshwari Debi*, I. L. R., 16 Cal., 71 (79, 80), P. C.

² *Collector of Ratnagiri v. Vyankat Rao*, B. H. C. R. (A. C.), 1.

tion which was for that purpose wholly ineffectual.¹ A gift to which an immoral condition is attached remains a good gift, while the condition is void.² A gift made conditional on the donee marrying with the previous written consent of a certain person is valid. When there is a gift in any event, the condition must not be regarded as made merely *in terrorem*, but one which must be fulfilled.³

896. No valid gift can be made upon a condition dependant upon the mere will of the donor. Such a gift is no gift at all. Thus if one were to say to another "I shall give you a horse if I chose," there is no promise, as the declarant is not bound by it. Similarly, if he give a horse, on condition that he will take it back whenever he likes, there is no gift. As was observed by Muttusami Ayyar, J., "Where a party to be bound by the declaration of his will annexes to such declaration a condition that he will be bound when he wills it, he is not bound at all. The reason is this. The declaration of the will is then contradictory in itself as it says, I do not now bind myself or undertake the duty."⁴ In such a gift the vital energy of the obligation is discharged at once. The transfer is not a transfer, but a license which alone the grantor may revoke at his pleasure and there is not much difference if to a gift a condition is imposed but which is entirely dependant on the will of the donor. In the former case, no doubt the gift would be void *ab initio*, and in the latter there would be a gift but voidable also on the fulfilment of the condition dependant on the donor's volition. In both cases the donor would be entitled to recover, subject of course, only to the law of limitation. But in the former case there has been no transfer at all, whereas in the latter case there has been a transfer although equally revocable at the mere will of the donor.⁵ Where a grant is for whatever cause resumable, it cannot be resumed without a reasonable notice.⁶

897. When a gift may be revoked.—When once a gift is complete, the donor has no power to revoke it.⁷ He cannot subsequently change his mind and set aside his own deliberate act. "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of Equity will not loose the fetters he has put upon himself, but he must lie down under his own folly."⁸ The donor cannot set aside the gift once made on the ground that he had made a mistake, or that he had supposed that the defendant could perform his funeral rights.⁹ As Lindley, L. J., said in a case: "Courts of

¹ *In re Autaji*, I. L. R., 18 Bom., 670.

² *Ram Sarup v. Bela*, I. L. R., 6 All., 313 (321), P. C.

³ *In re Nourse*; *Hampton v. Nourse* [1899], 1 Ch., 68.

⁴ *The Secretary of State v. Arathoon*, I. L. R., 5 Mad., 173 (179); see *Windscheid's Pandecten Law*, sec. 98.

⁵ *Faulkner v. Lowe*, 2 Ex., 595.

⁶ *Unide Rajah v. Penmasasamy*, 7 M. I. A., 146; *Lakshmi v. Chendri*, I. L. R., 8 Mad., 72.

⁷ *Rajaram v. Ganesh*, I. L. R., 28 Bom., 131.

⁸ 1 W. and T. L. C. (8th Ed.), 358.

⁹ *Abhachari v. Ramachendrayya*, 1 M. H. C. R., 398.

Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors. The Courts have always repudiated any such jurisdiction . . . It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects."¹ Ignorance which is the result of deliberate choice is no ground for equitable relief.² So it has been held that where the testator believed that the Divine Spirit spoke to him through his conscience and his action was directed by what he considered to be the command of the Almighty so conveyed, is no ground of insanity sufficient to set aside the will.³ But where the donor has been forced, tricked or misled in any way by others into parting with his property, the Court will undoubtedly protect him. And the section therefore, enacts that a gift may be revoked in all these cases. The rule is an equity arising out of public policy which demands that no man shall benefit by his own fraud or wrongful act. And accordingly if the donee has succeeded in obtaining the gift by any act amounting to coercion, fraud or undue influence, not only the donor, but his representatives may sue to have the gift set aside, for the right to have the transfer in such cases set aside does not cease on the death of the donor.⁴ But this does not mean that there is no limitation to such suits. And ordinarily if the donor desires to have his gift declared invalid and set aside, he ought to seek relief within a reasonable time after the removal of the influence under which the gift was made, or in the case of a fraud, when he became aware of it. If he does not, the inference is strong, and if the lapse of time is long, the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question, or, in other words, that he elects not to avoid it, or, what is in effect the same thing, that he ratifies and confirms it.⁵ At any rate there can be no doubt that even where the donor's suit is otherwise within limitation, if he has come into Court a long time afterwards to have his gift set aside, the Court will require him to prove some substantial reason for setting aside his alienation.⁶

A gift, made subject to a condition which is immoral, illegal or repugnant to the nature of the grant is not necessarily void. Where the gift itself is good, but the condition imposed is immoral, illegal or repugnant, the gift takes, but the condition is ignored.⁷ But if such a condition is the consideration for the gift, and is an essential part of it, the condition failing, the gift also fails.⁸ (§ 881.)

¹ *Allcard v. Skinner*, 36 Ch. D., 145 (183).

² *Id.*, p. 188.

³ *Hope v. Campbell* [1899], App. Cas., 1.

⁴ *Allcard v. Skinner*, 36 Ch. D., 145 (187).

⁵ *Wright v. Fanderplank*, 8 D. M. & G., 139; *Mitchell v. Humphrey*, 8 Q. B. D., cited

in *Allcard v. Skinner*, 36 Ch. D., 145 (187).

⁶ *Henry v. Armstrong*, 13 Ch. D., 688;

Coutts v. Acworth, L. R., 3 Eq., 553.

⁷ Secs. 10 11, 12

⁸ Sec. 25, and the commentary thereon.

898. The grounds upon which a gift will ordinarily be set aside may be stated to be (1) fraud, deceit, or misrepresentation; (2) coercion and undue influence; (3) mistake of fact including a mistake as to a law not in force in British India; (4) novation.

899. It is a well known principle before enunciated that no man can benefit by his own fraud. The most solemn acts of parties are vitiated by it. Any transfer for or without consideration into which fraud plays a part may be set aside at the instance of the party defrauded. But a transaction cannot be successfully assailed by making a general averment of fraud. In order to succeed there must be the assertion of a fact on which the person making the gift relied, and in the absence of which it is reasonable to infer that he would not have made it, or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the gift altogether.¹ And in considering the effect of fraud it is not necessary that all the representations made by the other party must be false for "where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently."² But here, of course, the misrepresentation complained of must be shewn to have prompted the gift, since a misrepresentation, which the donor does not believe in and does not influence his decision can never be of any consequence, whatever may have been the intention of the party who had uttered it. As Lord Brougham said in a case: "It is that general fraudulent conduct signifies nothing: that attempts to overreach so far nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract."³ Thus where a woman already married, induced another to go through the marriage ceremony, and the latter left her some property upon trust with a direction "to permit my wife, *Adelaide*, to receive from my death the net annual income thereof during her life" leaving the residue "in trust for my step-daughter, *Sarah Ward*, for her absolute use," it was held that inasmuch as the first legatee had imposed upon the testator, the bequest to her was wholly void, but since the residuary legatee was guilty of no fraud, the bequest in her favour was valid.⁴ And the same rule was laid down in a converse case where the gift made was by a woman to a man in

¹ *Pulsford v. Richards*, 17 Beav., 87.

² *Pertap Chunder v. Mohendranath*, I. L. R., 17 Cal., 291 (297), P. C.

³ *Attwood v. Small*, 6 Cl. & Fin., 447; to the same effect observed, *Jessel*, M. R., in

Smith v. Chadwick, 20 Ch. D., 27 (44).

⁴ *Wilkinson v. Joughin*, L. R., 2 Eq., 819, referred to in *Fanindra Deb v. Rajeshwar Das*, I. L. R., 11 Cal., 468 (484), P. C.

the character of her husband, but who was proved to have had a wife living at the time of his marriage to the donor.¹ A distinction must, however, be made between what is description only and what is the reason or motive or indeed a condition of a gift. The question for its decision must mainly depend upon the intention of the donor.

Thus in case finally decided by the Privy Council where the gift was made in the following words: "I authorize you by this *angikar-patro* to offer oblations of water and *pinda* to me and my ancestors after my death by virtue of your being my adopted son. Moreover you shall become the proprietor of all the moveable and immoveable properties which I owe and which I may leave behind." It was held that from the fact that the donee was to make offerings by virtue of being an adopted son, and "moreover" he was to become the proprietor clearly pointed to the intention that the gift was made to the donee not personally but by virtue of his being regarded as an adopted son, and that as the adoption was invalid, so was the gift.² But where a childless Hindu, by his will directed thus: "And as I am desirous of adopting a son, I declare that I have adopted Koibullo Pershad . . . My wives shall perform the ceremonies according to the *shastras*, and bring him up, . . . when he comes to maturity, the executors shall make over everything to him to his satisfaction." Subsequently the ceremonies of adoption having been performed by one widow only, and the other having brought a suit to recover half of the property, it was held that there was a gift of his property by the testator to a designated person, and that it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by Koibullo to be entirely dependent on whether the wives choose or did not choose to perform the ceremonies.³ The crucial point in all these cases, is, as has been observed before, the intention of the donor. If his intention was to provide a son for his spiritual betterment, and as a consequence he endowed him with his worldly goods there can be no question but that the adoption failing the gift fails also. But if the donor is shewn to have been moved by love or affection to the object of his gift, then there can be no doubt but the gift would take effect in spite of erroneous description. Thus in *Kennell v. Abbott*,⁴ the Master of the Rolls said: "I desire to be understood not to determine that where, from circumstances not moving from the legatee himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and this gift was not his own, I am not disposed by any means to determine that the provision for that child should

¹ *Kennell v. Abbott*, 4 Ves., 802 (808); 4 R. R., 351.

² *Fanindra Deb v. Rajeshwar Deb*, I. L. R., 11 Cal., 463 (484, 485), P. C.

³ *Nidhoomoni v. Saroda Pershad*, 26 W. R.,

91, P. C.; explained in *Fanindra Deb v. Rajeshwar Deb*, I. L. R., 11 Cal., 463 (485), P. C.

⁴ 4 Ves., 802 (808); 4 R. R., 351.

totally fail; for circumstances of personal affection to the child might mix with it, and which might entitle him, though he might not fill that character in which the legacy is given."¹ These observations, would however, have little application to a gift in which the donor is himself alive to repudiate it, and in which case, if he shows by evidence that he was under a *bona fide* belief that in making the gift he was under the mistaken belief that the donee was his legitimate son, the gift would be set aside. A gift made to a boy named, to be adopted by the testator's widow who "shall enjoy all my properties in every way as long as she may be alive" is a gift not to the donee consequent upon his adoption failing which the bequest would fall through.² But the case is otherwise, where the testator knowingly misdescribes the donee, or which is the same thing, where he is aware that his description will not bear scrutiny. Thus where the donor made a bequest to "A. B. my *avurasa* (legitimate) son" knowing that A. B. was not his *avurasa* son, it was held that the misdescription was of no consequence.³ So again, where a testator possessed of lease-hold estates spoke in his will of J. C. as his "son-in-law" and devised these estates to trustees for the use of his "daughter *Mary*, the wife of J. C.," for her life, for her sole and separate use, independent of the debts or control of "her present or any after taken husband," and in several places in his will mentioned J. C., and his daughter *Mary* in the same terms, and where it afterwards appeared that the union of J. C. and *Mary* was not a lawful marriage, J. C. having been formerly the husband of *Sarah Ann*, the sister of *Mary*,⁴ a fact known to the testator, his marriage to *Mary* being also made with his knowledge and assent, it was held that the bequest to her and her children was valid.⁵ The term "children" *prima facie* means legitimate children, and if there is a gift to "children" as a class, the law, if there is nothing in the deed clearly to shew a contrary intention, will apply the gift to legitimate children only. Where a gift is made to "the son's wife" there being nothing to shew that any particular wife was intended, the gift would be construed as having been made to the wife who may happen to be living when it takes effect.⁶ A gift to A and his *issue* would mean not only his children but also children's children and other lineal descendants comprised in the ordinary acceptation of the term.⁷ But where, as in the case last cited, there is evidence to shew that the donor, it may be, from a motive of delicacy has knowingly misdescribed the donee, the latter cannot suffer on that account. In such

¹ 4 Ves., 808 809; 4 R. R., 351.

² *Abbu v. Kuppammal*, I. L. R., 16 Mad., 355.

³ *The Court of Wards v. Venkata Surin Mahipati*, I. L. R., 20 Mad., 167; on appeal 3 C. W. N., 415, P. C.

⁴ In England a marriage with the deceased wife's sister is invalid.

⁵ *Hill v. Crook*, L. R., 6 H. L., 265.

⁶ *In re Drew*; *Drew v. Drew* [1899], 1 Ch., 386.

⁷ *In re Birks-Kenyon v. Birks* [1899], 1 Ch., 708; see also *In re Warren's trusts*, 26 Ch. D., 206 (216), in which the canon of construction in such cases is correctly laid down.

case it is sufficient if the intended donees are described by any name or description which they have acquired by reputation at the time of the gift. And for this purpose, it is not only not allowable, but it is the duty of the Court to obtain the knowledge which the donor had of the state of his family, and if it is reasonably certain that the donor had intended the objects of his bounty to take the gift, it is not open to it to criticise the feelings which may have led to the erroneous description.¹ In *Rishton v. Cobb*,² Lord Cottenham, has correctly laid down the principle in this respect. He says: "After looking through all the cases upon the subject, which are but few in number, I do not find that I can better define what circumstances will make the legacy void than by adopting the words of Lord Alvanley in *Kennell v. Abbott*,³ namely, that when a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy." In order then that the rule may come into operation two things must co-exist; first, the false assumption of the character by the donee; and secondly, there must be evidence, or a presumption or inference, that, that false character was the motive of the donor's bounty.⁴

900. In order to vitiate a gift, it is evident that the fraud

Agent's fraud.

complained of must be committed by either the donee or his agent in the ordinary course of his business,⁵ or if by a third person with his connivance. He cannot be damnified if the donor has been the victim of a fraud perpetrated by an unauthorized intermeddler. The fraud may consist in permitting a party to labour under error. A statement of a fact to be true of which the party making it knows nothing and which is untrue, is fraudulent. The fraud of the agent in the ordinary course of his duties for the principal, is constructively the fraud of the principal by which the latter is bound.⁶ And it is so provided by the Indian Contract Act, sec. 238 of which runs thus: "Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or fraud committed, by agents, in matters which do not fall within their authority do not affect their principals." "With respect to

¹ Per Lord Cairns in *Hill v. Crook*, L. R., 6 H. L., 265 (285).

² 5 Mq. & Cr., 145 (150).

³ 4 Ves., 809.

⁴ Per Fry, J., in *re Boddington*; *Boddington v. Clapham*, 22 Ch. D., 597 (602).

⁵ *Barrick v. English Joint Stock Bank*, L. R., 2 Ex., 250; *Mackay v. Commercial*

Bank, L. R., 5, P. C., 394; *Seire v. Francis*, 8 App. Cas., 106, P. C.

⁶ *Barrick v. English Joint Stock Bank*, L. R., 2 Ex., 250; *Mackay v. Commercial Bank*, L. R., 5, P. C., 394; *Seire v. Francis*, 8 App. Cas., 106, P. C.; *Central Railway Co. v. Kisch*, L. R., 2 H. L., 99.

the question," said Willes, J., "whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.¹ That principle is acted upon every day in running down cases. . . . In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."²

901. Evidence of fraud.—It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it.³ Initially the burden of proving fraud is on the person who alleged it.⁴ Before proof it must be distinctly alleged setting forth the particulars.⁵ General allegations, however strong, cannot be allowed to be proved. There must be given specific instances of the alleged fraud so as to give the defendant clear notice of what is imputed against him.⁶ (§ 295.)

902. Defences.—The imputation of fraud may be repelled by various circumstances. If it appears that the donor had the means of discovering the truth and used them, it would be a circumstance as tending to shew that the donor was not taken in unawares altogether. Then again, where the donor has after the discovery of fraud ratified the transaction, or where the gift itself was made after its discovery, he cannot afterwards repudiate it. If the donor for a considerable time takes no steps to rescind the gift, after he is apprised of the fraud, it may reasonably be supposed that he has condoned it. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.⁷ Lapse of time without rescinding will furnish evidence that the donor has determined to stand by his gift; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined.⁸ The fact that the

¹ *Lawyer v. Pointer*, 5 B. and C., 547 (554).

² *Barwick v. English Joint Stock Bank*, L. R., 2 Ex., 259 (265, 266).

³ *Abdul Hossain v. Turner*, I. L. R., 11 Bom., 620, P. C.; *Krishnaji v. Wamanji*, I. L. R., 18 Bom., 144.

⁴ *Mahomed Golub v. Mahomed Sulliman*, I. L. R., 21 Cal., 612.

Chanvimpia v. Danava, I. L. R., 10

Bom., 598.

⁵ *Krishnaji v. Wamanji*, I. L. R., 18 Bom., 144.

⁷ *Per Sir Barnes Peacock in Lindsay Petroleum Co. v. Hurd*, L. R., 5 P. C., 221 (240).

⁸ *Per Mellor, J., in Clough v. London and North-Western Ry. Co.*, L. R., 7 Ex., 26 (35).

gift was induced by fraud does not render it absolutely void, or prevent the property from passing. It merely gives the party defrauded a right, on discovering a fraud to elect whether he will continue to treat the transfer as binding, or will disaffirm it and resume the property. The determination of the donor's election may be made by express words or acts. If then the donor either by express words or by unequivocal conduct affirms the gift, his election is then determined for ever. In strictness, therefore, the question in such cases is, has the donor, having notice of the fraud, elected not to avoid the gift? or has he elected to avoid it? or has he made no election? So long, however, as he has made no election he retains the right to determine it either way, subject however to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position of even the wrong-doer is affected, it will preclude him from exercising his right to rescind.¹

903. Limitation.—The limitation for the cancellation of a gift on the ground of fraud is three years from the date the fraud becomes known to the party wronged.² But the limitation provided in Art. 95 of the Limitation Act must be regarded as extending the period over and above that provided under any other article.³ (§302.)

904. A gift obtained by duress or by the exercise of undue

(2) Coercion and undue influence.

influence no matter by whomsoever caused, is equally void. If the gift did not emanate as a free agent from the donor, the donee cannot take. Influence by coercion does not perhaps admit of much variety. It may consist of the use of either direct violence or compulsion, or such other influence which impels the donor to act although he does so unwillingly. In the Indian Contract Act coercion is defined to be "the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."⁴ This definition of coercion is certainly more comprehensive than the definition of the corresponding term "duress" in England, where "the fear that goods may be taken or injured, does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."⁵ Again, while under the Contract Act, a contract is voidable if induced by force or threats proceeding from any person, and not necessarily the accused, in

¹ *Clough v. London and North-Western Ry. Co.*, L. R., 7 Ex., 26 (85).

² Arts. 91, 95, 96, 114 of Sch. II, Indian Limitation Act (Act XV of 1877).

³ *Opendor v. Gudadhur*, 35 W. R., 476; *Chander v. Tirthanund*, I. L. R., 3 Cal., 504;

Unasankaran v. Kalka, I. L. R., 6 All., 75 (77).

⁴ Sec. 15, Indian Contract Act (Act IX of 1872).

⁵ *Skene v. Beale*, 11 A. & E., 683.

England coercion caused by a stranger would not avail the donor.¹ In this respect the rule enacted in this country is adopted from the Roman Law under which violence and intimidation (*vis, metus*), whether caused by the promisee or by a stranger to the contract, makes it voidable.² In compulsion the party acts, through mere helplessness. He is cognizant of the influence and would gladly shake it off if he could. It is therefore seldom difficult to prove coercion. But it is by no means always easy to prove "undue influence." In the former the donor would revolt against the act, but has no option but do it. In the latter the influence used is so subtle that the donor fancies himself a free agent and willingly performs the act. "Undue influence" is a compound of imperceptible compulsion and seductiveness. There is always an admixture of coercion and fraud in such an influence. Indeed, Lord Cranworth in defining the term said: "It is sufficient to say that allowing a fair latitude of construction they must arrange themselves under one or other of these heads, coercion or fraud."³ It must be, however, distinguished from such an influence as two relations or friends might ordinarily be expected to exercise over each other. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate and may be fairly pressed on the donor. But pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid gift can be made. Importunity or threats, such as the donor has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the donor's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a donor may be led but not driven; and his gift must be the offspring of his own volition and not the record of some one else's.⁴ The influence then condemned by law is such as in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, some personal advantage obtained by the donee placed in some close and confidential relation to the donor.⁵ But the undue influence which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one

¹ *Smith v. Monteith*, 13 M. R. W., 427.

² Dig. 4, L. iii., 2, Frag. 9, sec. 1.

³ *Boyce v. Rossborough*, 6 H. L. C., 1 (4n), cited and followed in *Sayad Muhammad v. Futeh Muhammad*, 1 L. R., 32 Cal., 324 (386), P. C.

⁴ *Halt v. Halt*, L. R., 1 P. & M., 481 (482).

⁵ *Norton v. Rely*, 2 Eden, 286; *Nottidge v. Prince*, 2 Giff., 246; *Lyon v. Home*, L. R., 6 Eq., 656; *Allead v. Skinner*, 36 Ch. D., 145 (161).

mind over another is very subtle, and of all influences, religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible.¹

905. "Undue influence" defined.—These principles are embodied in the following definition of "undue influence" given in sec. 16 of the Indian Contract Act.²

(1). "A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2). In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

(3). Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of sec. 111 of the Indian Evidence Act, 1872."

Illustrations.

(a) A having advanced money to his son B, during his minority upon B's coming of age obtains by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advances, A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A

¹ Per Lindley, L. J., in *Allcard v. Skinner*, 36 Ch. D., 145 (188). For similar Indian cases see *Ashghar Ali v. Debroos Banoo*, I. L. R., 8 Cal., 324, P.O.; *Mannu Singh v. Umadat Pande*,

I. L. R., 12 All., 523; *Bai Manigarrri v. Narondas*, I. L. R., 15 Bom., 549.

² Act IX of 1872, as amended by Act VI of 1899.

accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence."

In considering the influence of one man over another regard must always be had to not only the position one has occupied in relation to the other, but also to the age, temperament, habit of life, and mental and moral susceptibilities of each party. A donor who may not have yielded to the demands of his surgeon might easily succumb to those of the spiritualist. A man who may have repelled the advice before may, when prostrate and low, be feign to accept it.¹ And the undue influence may in many cases be the result of an ascendancy acquired quite indirectly and by degrees of the impropriety of which neither the donor nor the donee were conscious. Thus where in a case, a lady aged thirty five, was in 1868, introduced by N, her spiritual director and confessor, to S, the lady superior of a sisterhood, and became an associate of the sisterhood, and after passing through the grades of postulant and novice, became a professed member of the Convent and bound herself to observe *inter alia* the rules of poverty, chastity, and obedience, by which the sisterhood was regulated, and which was made known to her when she became an associate. The rules of poverty having required the member to give up all her property preferably to the sisterhood, and by the rule of obedience she as a member being required to regard the voice of her superior as the voice of God, feeling it to be her duty, in 1871, 1872 and 1874, she made over all her property to the Lady Superior, it was held that although she had voluntarily and while she had independent advice entered the sisterhood, but inasmuch as at the time when she made the gifts her will was dominated by the donee, she was entitled to repudiate the gift upon leaving the sisterhood.² Having regard to the latches and subsequent acquiescence proved in the case, the Court however declined to restore her the property, it being held that she had subsequently ratified and confirmed what she had originally given under the dominating influence of the donee. In another similar case a voluntary settlement made by a widow in favour of a clergymen in charge of the management of her affairs was for similar reasons set aside.³ A gift made by the donor in favour of a Brahmin as a trustee to perform his funeral ceremonies and to carry out certain religious observances would fall within the same category.⁴ And so a gift made to the donor's guru or spiritual adviser with the sole object of securing benefits to the donor's soul in the next world, and for having heard the donee recite the holy book called Bhagwat, was set aside on the ground of the improvidence of the gift and the absurdity of the reason alleged for it.⁵ A donee from a Hindu widow must prove that

¹ *Sala Mahomed v. Dame Janbai*, I. L. R., 23 Bom., 17, P. C.

² *Allcard v. Skinner*, 86 Ch. D., 145.

³ *Eugenie v. Baseley*, 2 W. & T. L. C. (6th Ed.), 597.

⁴ *Bai Manigarrri v. Narondas*, I. L. R., 15 Bom., 549.

⁵ *Mannu Singh v. Umadat Panda*, I. L. R., 12 All., 529.

what he has received was given to him as a free gift made with knowledge by her of her rights, and this liability cannot be discharged by the fact that the document was intended to be a release or one by which the donor had ceded her rights.¹ On an issue of undue influence, a Court should consider whether the gift in question (a) is one which a right-minded person might be expected to make; (b) is or is not an improvident act on the donor's part; (c) is such as to have required advice, if not obtained by the donor; and (d) whether the intention to make the gift originated with the donor.² Gifts to persons standing in a fiduciary relation to the donor are always regarded by the Courts with suspicion. Such relationship is necessarily created where the donee occupies any position of confidence or trust or real or apparent authority over the donor. The relation of parent and child, husband and wife,³ principal and agent, or principal and surety, pleader or attorney and client, trustee and *cestue-que-trust*, guardian and ward, spiritual guide and disciple, surgeon and patient is regarded as fiduciary within the meaning of the rule.

906. Pardanashin lady.—The case of a *pardanashin* lady furnishes another apt example. In dealing with a *pardanashin* lady, "it is incumbent on the Court, when dealing with the disposition of her property, to be satisfied that the transaction was explained to her and that she knew what she was doing, and especially so in a case where, for no consideration and without an equivalent, a lady has executed a document which deprives her of all property."⁴ In such a case it is incumbent upon the donee who sets up and relies upon the deed to show affirmatively that the donor entered into it with full knowledge and understanding and deposing power, and that the entire transaction was free from circumstances throwing any shadow of doubt or suspicion on the inception, execution and application of the deed.⁵ A *parda* woman in this country is entitled to receive the same protection which the Courts of Chancery in England always extends to the weak, ignorant and infirm, and to those who for any other reason are specially likely to be imposed upon by the exertion of undue influence, which is presumed to have been exerted unless the contrary be shown. In all dealings, therefore, with persons so situated, it is incumbent on the party interested in upholding the transaction to show that its terms are fair and equitable, the most usual mode of discharging such onus being to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other party.⁶ The onus in all such cases being initially upon the party benefited by the transaction, it lies upon him to give satisfactory evidence that the donor not only executed

¹ *Deo Kuar v. Nan Kuar*, 1 L. R., 17 All., 1, P. O.

² *Mahomed Bukah v. Hoosini Bibi*, 1 L. R., 15 Cal., 684, P. C.

³ *Hakim Muhammad v. Najiban*, 1 L. R., 20 All., 447, P. C.

⁴ *Ashghar Ali v. Delroos Banoo*, 1 L. R., 3 Cal., 324 (337), P. C.

⁵ *Mariam Bibi v. Sakina*, 1 L. R., 14 All., 8 (16).

⁶ *Rukhun v. Ahmed Hossain*, 22 W. R., 443; *Fuzul Hossain v. Anjud Ali*, 17 W. R., 523.

the deed, but that she has had an opportunity to take independent advice, and that she was a free agent and duly informed of what she was about.¹ In the case of a *pardanashin* woman, who has no legal assistance, the ordinary presumption, that if a person of competent capacity signs a deed he understands the instrument to which he has affixed his name, does not arise.² The person who deals with her must shew entire good faith (*uberrimæ fidei*) in respect of the entire transaction and the proceedings consequent thereupon.³ Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same, though the circumstances differ, and as general rule, the same questions arise. The first and principally perhaps the most important question is, was the transaction a righteous transaction, that is, was it a thing which a right-minded person might be expected to do? Then there comes the question—was it an improvident act? That is to say, does it show so much improvidence as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing? Then was it a matter requiring a legal adviser? And lastly did the intention of making the gift originate with the donor.⁴ Where from the very terms of the gift it appears that the donor could not have willingly executed it, very strong evidence indeed would deem to be requisite to rebut the natural presumption created thereby. Thus where in a case where the donor a Mahomedan Begum executed a deed of gift and “endowed the entire estate held and owned by her to the Imambara for religious purposes,” the effect of which was to destroy her rights as proprietor and to devote all the property which she possessed to religious uses, but the donor continued to act as a proprietor although described only as a *mutawalli* (manager); it was held that it was impossible to suppose that she could have been conscious of the tenor and effect of the deed, when immediately after, and ever after, she wholly disregarded the trusts of it by the mode in which she dealt with the property.⁵ But where

¹ *Manohar Das v. Bhagabati*, 1 B. L. R. (O. C.), 28; *Kanailal v. Kamini*, ib., 81, note; *Ram Pershad v. Phoolputtee*, 7 W. R., 98; *Roop Narain v. Gajadhar*, 9 W. R., 297; *Soondur Koomaree v. Kishore Lal*, 5 W. R., 246; *Thakoordeen v. Ali Hosein*, 13 B. L. R., 427, P. C.; *Delroos Banoo v. Ashghar Ali*, 15 B. L. R., 167; on appeal, *Ashghar Ali v. Delroos Banoo*, 1 L. R., 8 Cal., 824, P. C.; *Griish Chunder v. Bhuggobutty*, 13 M. I. A., 419; *Sookyaboye v. Latchmi*, 13 W. R., 3, P. C.; *Sidisht Lal v. Sheobharat*, 1 L. R., 7 Cal., 245; *Mahomed Buksh v. Hosseini Bibi*, 1 L. R., 15 Cal., 684, P. C.; *Wajid Khan v. Eboaz Ali Khan*, 1 L. R., 18 Cal., 545, P. C.; *Abtkunnisa v. Rup Lal*, 1 L. R., 25 Cal., 607; *Ruja Bai v. Ismail Ahmed*, 7 B. H. C. R. (O. C.), 7; *Tamara Shere v. Maranai*,

1 L. R., 8 Mad., 215; *Khatija v. Ismail*, 1 L. R., 12 Mad., 380; *Badi v. Sami Pillai*, 1 L. R., 18 Mad., 257; *Mannu Singh v. Unadat Pande*, 1 L. R., 12 All., 623; *Achhan Kuar v. Thakur Das*, 1 L. R., 17 All., 125; *Bai Manicavri v. Narandas*, 1 L. R., 15 Bom., 549; *Deokuar v. Mankuar*, 1 L. R., 17 All., 1, P. C.; *Hakim Muhammad v. Najiban*, 1 L. R., 20 All., 447, P. C.

² *Ashghar Ali v. Delroos Banoo*, 1 L. R. 3 Cal., 324, P. C.

³ *Mariam Bibi v. Sakina*, 1 L. R., 14 All., 8 (12.)

⁴ *Mahomed Buksh v. Hosseini Bibi*, 1 L. R., 15 Cal., 684 (698), P. C.

⁵ *Ashghar Ali v. Delroos Banoo*, 1 L. R., 3 Cal., 324 (329), P. C.

in another case two Nambudri females, a mother and daughter (plaintiff), executed a document in favour of defendant, a male relative (nephew of the former), which purported to divest the plaintiff and her mother of the entire property of the *illom* of which they were the sole proprietors, and to vest it in the defendant in consideration of his promise to marry and raise up heirs to the *illom* to which the plaintiff and her mother belonged, and to maintain the plaintiff and her mother till death, and it was proved that plaintiff was well aware of what she was doing, and had subsequently clearly recognised the defendant as absolute proprietor of the property and was contented with his having assumed the position pointed out in the document, it was held that the transaction was valid, and could not be called into question on the suggestion that plaintiff was placed at a disadvantage and was not fully cognisant of the irrevocable nature of the deed.¹ A document obtained by the chief male member of a family from a *pardanashin* lady should receive a strict construction.²

907. The evidence which may be sufficient to support an ordinary transaction would not on that account be sufficient to support a deed against a *parda* lady. Where in a suit brought

How much should be proved

upon a bond purporting to have been executed on behalf of two Mahommedan *pardanashin* ladies by their husbands, the only proof given was the testimony of one person that the power-of-attorney authorizing the person who presented the document for registration was executed by them, and there was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond, it was held that the evidence was insufficient, and since the onus lay upon the plaintiff who had failed to show that the executants were free agents in the matter, and having a clear knowledge of what they were doing, accorded their consent to it, the transaction could not be upheld.³

A deed of gift alleged to be made in the form of a deed of sale with a view to evade the restrictions of the Mahommedan law would be bad as both illegal and opposed to public policy.⁴ In a case where a lady 65 years of age and comparatively illiterate made over a large portion of her property to her managing agent for management in perpetuity on behalf of a certain endowment which she created, it was held that having regard to the fact that a comparatively small portion of the *wasika*, or endowment, could be annually allocated to the expenses of the tomb, and that a large surplus would each year remain in his hands; if the manager must be considered to fill such a position towards her as to render it incumbent upon him to show that he had made a proper use of the confidence reposed in him by her, and that the

¹ *Tamarashetti v. Maranat*, I. L. R., 3 Mad., 215; *Takoordeen v. Ali Hossein*, L. R., 1 I. A., 192; *Ashghar Ali v. Delroos Banco*, I. L. R., 3 Cal., 324, P. C.

² *Boobyaboye v. Latchmi*, 13 W. R., 3, P. C.

³ *Behari Lal v. Habiba Bibi*, I. L. R., 8 All., 267.

⁴ *Kumeroonissa v. Syufoollah*, 16 W. R., 32, P. C.; confirming *Kumeroonissa v. Syufoollah*, 5 W. R., 198.

execution of the document, granted without any valuable consideration and from which he obtained important pecuniary benefit, was free from all attempt at undue influence.¹ It is therefore immaterial whether the transferee is the actual donee or a trustee, if he bargains in a matter of advantage, with a person placing confidence in him, he is equally bound to show that a reasonable use has been made of that confidence.² A disposition of her property by a person in *extremis*, even if made in favour of her own blood relation would have to be carefully scrutinized.³

908. Presumption how rebutted.—The *onus* which in such transactions clearly lies upon the party benefited, may be discharged in the manner before indicated. The party may, for example, show that the donor had independent advice or was fully cognizant of what she was doing. Again there may be circumstances in view of which the exercise of undue influence may be shown to be improbable. Thus where a *Posha* woman executes an instrument in conjunction with her son and brother, she is not entitled to repudiate the transfer for want of proof that the transaction had been explained to her.⁴ Again where the donor although he may have under undue influence made the gift, but if he has subsequently acquiesced in the transaction he has then no remedy.⁵ Where the donor had time to think, it is a circumstance negating the presumption. Thus in a case where the donor had purchased the stamp paper for the deed of gift on a certain date, it was taken as showing that it was then the intention of the donor to execute the deed.⁶ Again, as old age, weakness of intellect and similar disabilities favour the inference against the donee, so should superiority in intellect and business ability rebut the presumption of undue influence. Representatives of the parties are bound to discharge the *onus* in the same way as the original parties to the gift, and when the burden of proof lies upon either the donor or the donee it cannot be shifted by reference to the fact that the original parties to the transfer have died, or that the facts which they could have proved can no longer be sustained.⁷

Where two brothers made and registered mutual gifts, and one of them afterwards sought to impeach it on the ground that the deeds of gift had not been intended to operate, and that the transaction was not real but only a pretence, there was no question of undue influence, and the burden was thrown on the brother who impeached the transfer.⁸

¹ *Wajid Khan v. Ewar Ali*, I. L. R., 18 Cal., 545 (548), P. C.

² *Id.*, p. 546; see also *Kamini Sundari v. Kali Prasanno*, I. L. R., 12 Cal., 225, P. C.; following *Beynon v. Cook*, L. R., 10 Ch., Ap., 389 (391).

³ *Grieh Chunder v. Bhuggebutty*, 14 W. R., 7, P. C.

⁴ *Badi Bibi v. Sani Pillai*, I. L. R., 18 Mad., 257; *Shariya Bibi v. Gulam Mahomed*,

I. L. R., 16 Mad., 48.

⁵ *Seetharamu v. Bayanna*, I. L. R., 17 Mad. 275.

⁶ *Shariya Bibi v. Gulam Mahomed*, I. L. R., 16 Mad., 43 (50).

⁷ *Wajid Khan v. Ewar Ali*, I. L. R., 18 Cal., 545, P. C.

⁸ *Sham Chand v. Protap Chunder*, I. L. R., 25 Cal., 78, P. C.

In considering the question of undue influence, regard must be had to the circumstances existing at the time of the gift and not to subsequent events.¹ And where undue influence is alleged, the bare statement of the donor that he had confidence in the donee unsupported by any extraneous evidence will not be sufficient. When a donor has made up his mind to repudiate his own act, it is but natural that he should plead undue influence and coercion. But because the transfer happens to be voluntary it should not be readily assumed that the transfer was forced upon him, unless there is some tangible evidence to convince the legal mind that such influence as equity would relieve against was the proximate cause of the gift.² A person taking a gift *benami* cannot avoid the imputation of undue influence. His position is if anything worse than if he had been the avowed donee, for the mere fact that he has chosen the circuitous route for benefiting himself is in itself a sufficient fact to suggest an inference that the transfer is probably tainted with fraud.³

909. Rights of bona fide transferees.—Although as between the immediate parties to a voluntary alienation, a gift may be resumable by the donor, it cannot be resumed if between the date of the gift and the donor's suit, the property has been transferred to a *bona fide* transferee for consideration without notice.

910. Since consent of the donor is implied in a gift, and there can be no free consent when it is caused by mistake,⁴ it follows that the donor may repudiate the transaction to which he was a consenting party by mistake. But the mistake must be one of fact, or of law not in force in British India.⁵ For a mistake as to a law in force in British India is not such a mistake as the Court will relieve against. "Every man," said the Chancellor Kent, "is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."⁶ The law presumed to be known, however, is the general law of the land. No one is presumed to master the local or municipal laws of every place.⁷ And similarly no one is supposed to know the existence of a particular legal title, which is not a "law in force in British India."⁸ A mistake may arise in various forms. If the donor and the donee do not agree upon the same thing in the same sense there is a mistake.⁹ Thus if a man illiterate or blind "forbears to read, has

¹ *Ganga Bakes v. Jagat Bahadur*, 1 L. R., 23 Cal., 15, P. C.

² *Id.*; *Bala Mahomed v. Dame Janbai*, 1 L. R., 22 Bom., 17, P. C.

³ *Fuxelson v. Omdah*, 18 W. R., 469 (478).

⁴ Sec. 14 (5), Indian Contract Act (Act IX of 1872); sec. 26, Specific Relief Act (Act I of 1847); but sec. 22, Indian Contract Act (Act IX of 1872).

⁵ *Id.*, sec. 21.

⁶ *Lyon v. Richmond*, 2 Johns., Ch., 60.

⁷ *Beauchamp v. Wynn*, L. R., 6 H. L., 223.

⁸ *Cooper v. Phibbs*, L. R., 2 H. L., 149; *Jones v. Clifford*, 2 Ch. D., 779; *Soper v. Arnold*, 37 Ch. D., 96.

⁹ Sec. 13, Indian Contract Act (Act IX of 1872).

a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force, and it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended."¹ Similarly an error as to the subject-matter of a gift would vitiate it. In all such cases the gift is annulled and the parties are restored to their original position.² Where a Collector granted a *patta* of certain waste lands to the plaintiff, and then subsequently considering the first *patta* not in accordance with the *darkhast* rules, granted another *patta* to other persons, it was held that the Collector having once transferred the property to the plaintiff could not re-transfer it to another. "The case was simply one of mistake; the tahsildar would not have issued the *patta* had he known all the facts. In our opinion, allegation and proof of such mistake does not justify the cancelment of a *patta* issued by a competent officer in favour of one who has come into occupation of the land under it."³

Where the donor intends to make a gift on one set of terms, and the donee accepts it on another set of terms, that is in other words, the parties are not *ad idem*, there can be no gift, and even if it has been reduced into writing, the result is the same. Thus where the donor gives a particular thing by description, and the donee accepts the gift, but the donor did not intend to give what the donee has accepted, and in fact both have been misled by the similarity, there is no gift.⁴ Again the gift of a thing non-existing is invalid. "There must," says Pothier speaking of sale, "be a thing sold which forms the subject of the contract. If, then ignorant of my horse I sell it, there is no sale for want of a thing sold."⁵ But the mistake must be as regards a fact essential to the transfer. A mere erroneous opinion as to the value of the subject-matter of the gift, is not to be deemed a mistake as to a matter of fact.⁶ And it is apprehended that a gift, like a contract is not rescindable, when the mistake of fact is only unilateral,⁷ but in such a case if the donor was under a mistake, the donee can hardly enforce specific performance of the donor's promise.⁸ Gift to an uncertain donee is absolutely void. But a mere mis-description of either the donee or the subject-matter of the gift

¹ *Foster v. Mackinnon*, L. R., 4 C. P., 704; *Mackillican v. Compagnie des Messageries Maritimes*, 1. L. R., 8 Cal., 327.

² Sec. 36, Specific Relief Act (Act I of 1877).

³ *Collector of Salem v. Rangappa*, 1. L. R., 12 Mad., 404 (406).

⁴ *Raffles v. Wichelhaus*, L. J., 33 Ex., 160.

⁵ *Contrat de Vente*, No. 4; *Hastie v. Couturier*, L. R., 9 Ex., 102.

⁶ Sec. 20, Indian Contract Act (Act IX of 1872).

⁷ *Ib.*, sec. 22.

⁸ Sec. 28, Specific Relief Act (Act I of 1877).

does not vitiate it. A gift the purpose of which is uncertain is also invalid.¹

911. Novation.—One gift may be generally substituted by another, the effect of which is to discharge the prior gift. A similar provision, as regards contracts, is made in sec. 62 of the Indian Contract Act.²

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

property burdened by any obligation is not bound by his acceptance.

Illustrations.

- (a) A has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.
- (b) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

912. Analogous law.—This section is adopted from the corresponding two sections, 109 and 110, forming Chapter XIV, of the Indian Succession Act.³ These sections relate to onerous bequests and run thus :—

109. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Onerous bequest.

¹ *Stand v. Mellor*, 5 Ch. D., 223.

² Act IX of 1872.

³ Act X of 1905.

Illustration.

A, having shares in (*X*), a prosperous joint-stock company, and also shares in (*Y*), a joint-stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to *B* all his shares in joint-stock companies. *B* refuses to accept the shares in (*Y*). He forfeits the shares in (*X*).

One of two separate and independent bequests to same person may be accepted, and other refused.

110. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them, and refuse the other, although the former may be beneficial, and the latter onerous.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to *B* the lease and a sum of money. *B* refuses to accept the lease. He shall not, by this refusal, forfeit the money.

The last paragraph is in its principle analogous to sec. 248 of the Indian Contract Act.¹

Illustrations (a) and (b) of the section are taken from the cases of *Moffett v. Bates*,² and *Warren v. Rudall*³ respectively.

913. Principle.—This section applies the rule of election⁴ before treated, by which the transferee is at liberty to elect or repudiate an indivisible gift. But where two or more gifts are made at the same time, the donee is at liberty to accept any or all of them. The reason for the rule is that the donor having by one inseparable transaction made the gift and burdened it by a condition, the donee cannot take what is to his benefit and reject the rest charged with an obligation. But where a gift is in the form of two or more separated and independent transfers, each part being separate, the donor cannot expect the discharge of any obligation separated from the gift upon which it is charged. The question is really one of intention,⁵ and the law presumes that the donor by making a gift in the form of a single transfer intended that the donee who accepts the benefit of a transaction must also accept its burden unless the transactions are so far separate and independent as to lead to the inference that only a certain transfer was charged with it. A similar rule was enunciated in *Whistler v. Webster*⁶ in which it was said "that no man shall claim any benefit under a will without conforming, so far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place."

914. Meaning of words.—"In the form of a single transfer": in which case the transfer is indivisible, and the donee must take all or none at all. "*A donee not competent to contract*," e.g., a minor, an idiot, a lunatic, etc. "*He becomes so bound*," i.e., by estoppel.

¹ Act IX of 1872.

² 3 Sm. & Gift., 468.

³ 1 J. & H., 1.

⁴ Sec. 35.

⁵ *Wallinger v. Wallinger*, L. R., 6 Eq., 301.

⁶ 2 Ves., 867; see also *Wollaston v. King*, L. R., 8 Eq., 168 (174).

915. Disqualified donee.—An onerous gift may be validly made to a donee disqualified to contract. And if he accepts it, he is given the choice upon the removal of his disqualification to either accept the gift with the burden thereon, or to return it. But if after the removal of the disqualification the donee being aware of the burden, retains the property, he becomes bound by the obligation. In other words, the donee must, as soon as he is competent to elect, repudiate the gift, if he wishes to be free from it. Similarly in partnership transactions “a person who has been admitted to the benefits of partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.”¹

But while the donee is reserved the power to disaffirm the gift made to him during the period of his disability, as regards the donor the gift is complete. If therefore the donee dies in the meantime, the donor cannot resume the property treating the gift as inchoate or revocable. Thus in a Madras case where the gift of a land was made by the defendant to the minor wife of the plaintiff who accepted it and died in infancy leaving the plaintiff her heir, the latter having sued to make good his title to the land against the donor, it was held that the gift was complete against the donor and that the plaintiff was entitled to a decree.²

128. Subject to the provisions of section one

Universal donee. hundred and twenty-seven, where a gift consists of the donor's whole

property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

916. Analogous law.—The principle of this section is taken from the Civil law, under which the donee or legatee was charged with a similar liability.³ The obligation was said to arise *quasi ex contractu*. The reason upon which the rule is founded will be found discussed in the sequel. The rule here enacted differs considerably from that adopted in England, where there can be no such succession except in the case of the donor's death or bankruptcy. In any other case, the universal donee there takes subject to no similar liability.

917. Principle.—The liability of the universal donee for the debts of the donor to the extent of the value of the property received by him was clearly laid down in the Roman Civil law. In the institutes of Gains and Justinian, succession was divided into

¹ Sec. 248, Indian Contract Act (Act IX of 1872).

² 20 Mad., 147.

³ *Subramania v. Sita Lokshmi*, I. L. R.,

⁴ Dig., Bk. 37, Tit. 1, Drug. 3.

two parts, singular succession (*acquisitio singularum rerum*) and universal succession (*acquisitio per universitatem*). The former consisted in the acquisition of a specific property, though it may happen that the property so acquired was all that the transferor was owner of. But where the acquisition was not specific, a case of universal succession was said to arise. The donee then succeeded to all the rights as well as the liabilities of the donor, or rather to as many such rights and duties as the law permitted to be transferred. He was accordingly bound to liquidate the liabilities of the transferor at least to the extent of the benefit received by him.

This rule is not in its entirety followed in England, for there a voluntary alienee is not bound to discharge the liabilities of the alienor, except in the case of the latter's death, bankruptcy or insolvency, or where the transfer is shown to have been made fraudulently with a view to defeat the rights of creditors. In England therefore the donor does not transfer his liabilities with the transfer of his whole estate. His personal liability to the creditors still continues, the universal donee as such being in no way liable for his debts.

The rule enacted by the Act is independent of sec. 53, and therefore the creditor need not impeach the gift in order to get himself paid. The position of the universal donee is like that of the heir who is similarly and to the same extent, personally bound to pay the creditors of the deceased ancestor.

In a Bombay case decided in 1882, it was held that where the donee is liable to pay the donor's creditors, the latter may in order to avoid the circuity of actions tack on an unsecured debt to secured debts.¹ As an instance of a universal gift may be mentioned the case of a Hindu widow surrendering her life-interest to her reversioner.²

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Mahommedan

**Saving of donations
"mortis causa" and
Mahommedan law.**

law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law.

918. Analogous law.—This section excepts gifts of moveable property made in contemplation of death, as these were already dealt with in sec. 178 of the Indian Succession Act.³ The reason for making the other exemptions was thus stated by Mr. Stokes when the Bill was before the Legislative Council: "They had also saved the rules of Hindu and Buddhist law from the provisions of the chapter on Gifts, save only that which required,

¹ *Ragho Gorind v. Balrant*, I. L. R., 7 Bom., 101.

Cal., 286, P. C.; *Nobokishore v. Hari Nath*, I. L. R., 10 Cal., 1102, F. B.

² *Behari Lal v. Madho Lal*, I. L. R., 19

³ Act X of 1865.

in the case of a gift of land, writing, registration and attestation. The rule that a Hindu father might, in case of necessity, resume gifts made to his son (Dayabhaga, II, 57)¹ would thus remain unaffected."²

919. Principle.—The effect of this section is to exempt from the operation of its provisions all gifts made in contemplation of death, and those made by Hindus, Mahomedans, or Buddhists, save only that Hindu and Buddhist gifts must conform to the provisions of sec. 123. In so far as the equitable provisions of the chapter are founded upon equity and reason, they do not conflict with the Hindu and Mahomedan law. The section does not mean that its provisions shall not apply to Hindus and Mahomedans, but it enacts that its provisions shall not *affect* any rule of the specified laws, which in other words means that wherever the provisions of the chapter and those of the Hindu, Mahomedan and Buddhist laws conflict, the latter shall prevail.

920. Meaning of words.—“*Relates to gifts of moveable property*,” means that only *donatio mortis causa* of moveable property is excepted. A similar gift of *immoveable* property must be made under the chapter. “*Shall be deemed to effect, &c.*,” means shall not overrule any such rule. “*Save as provided by sec. 123 :*” which applies equally to Hindu and Buddhist laws. The term “*Hindu*” has been the subject of judicial interpretation by the Punjab Chief Court. The term was there held to be construed in a popular sense. “A non-Hindu,” it was said, “may become a Brahmo, and a Brahmo therefore need not be a Hindu, and a Hindu may become a Brahmo and need not cease to be a Hindu. Before a man can be declared to have ceased to be a Hindu by adopting another faith the fact of his conversion ought to be proved. If a Hindu has an admiration for the principles of Christianity and attends church service he does not cease to be a Hindu, and his personal law does not cease to be binding on him without baptism.” So again a declaration by a Brahmo under Act III of 1872, which provides for the civil marriage of persons other than Hindus, Jains, Sikhs, Christians, Buddhists and Mahomedans, does not make a man a non-Hindu. A man does not cease to be a Hindu if he takes beef or eats food cooked by Mahomedans, Christians, and low caste cooks or follows other heterodox practices. The result is not a renunciation of religion, but at least the infliction of a social punishment.³

921. Donatio mortis causa of moveable property.—A gift of moveable property made in contemplation of death,

¹ The reference is to the following passage: Accordingly Harita says: “A father during his life distributing his property may retire to the forest, or enter into the order suitable to an aged man; or he may remain at home, having distributed small allotments and keeping a greater portion: should he become

indigent, he may take back from them.” Dayabhaga, Ch. II, § 57.

² Mr. Stokes’ speech, Legislative Council (Appendix).

³ Jogendra Chandra v. Rani Bharan: In re Sirdar Dyal Singh’s will: Tribune (May 1900, supp.).

is subjected to no restrictions. It may be made orally or in writing and with or without registration. Thus sec. 178 of the Indian Succession Act provides :—

Property transferable by gift made in contemplation of death.

A gift is said to be

When gift said to be made in contemplation of death.

Such gift resumable.

It does not take effect if he recovers from the illness during which

When it fails.

178. A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

made in contemplation of death, where a man who is ill, and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

Such a gift may be resumed by the giver.

It was made ; nor if he survives the person to whom it was made.

Illustrations.

(a) *A*, being ill, and in expectation of death, delivers to *B*, to be retained by him in case of *A*'s death—

- a watch :
- a bond granted by *C* to *A* :
- a bank-note :
- a promissory note of the Government of India endorsed in blank :
- a bill of exchange endorsed in blank :
- certain mortgage-deeds.

A dies of the illness during which he delivered these articles

B is entitled to—

- the watch :
- the bond secured by *C*'s bond :
- the bank-note :
- the promissory note of the Government of India :
- the bill of exchange :
- the money secured by the mortgage-deeds.

(b) *A*, being ill, and in expectation of death, delivers to *B* the key of a trunk, or the key of a warehouse in which goods of bulk belonging to *A* are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them, in case of *A*'s death. *A* dies of the illness during which he delivered these articles. *B* is entitled to the trunk and its contents, or to *A*'s goods of bulk in the warehouse.

(c) *A*, being ill, and in expectation of death, puts aside certain articles in separate parcels, and marks upon the parcels respectively the names of *B* and *C*. The parcels are not delivered during the life of *A*. *A* dies of the illness during which he set aside the parcels. *B* and *C* are not entitled to the contents of the parcels."

922. Gift under Hindu law.—The essential requirements of a valid gift under the Hindu law have been before generally laid down. But the importance of the subject necessitates its more comprehensive treatment. To begin with, in a gift made before the passing of the Act, there must be an offer on the part of the donor, its acceptance by or on behalf of the donee, and according to certain authorities the transfer of possession. No writing or registration was required to complete the transfer, but

since sec. 123 of the Act applies equally to Hindu gifts, it follows that transfers by gifts made since the passing of the Act must be made in writing and be registered in accordance with the requirements of that section. A gift once made cannot be revoked, and is good against the donor's creditors, unless it was made fraudulently and with a view to conceal the real ownership. But the donor is entitled to rescind the gift in certain specified cases, as where the donee has practised fraud upon him, or where it is the result of mistake, coercion or undue influence. A gift may be made subject to the performance of a condition, unless it has the effect of creating an estate unknown to, or forbidden by, Hindu law. A *donatio mortis causa* is an example of a conditional gift dependent upon the death of the donor. If, therefore he recovers from the illness during which it was made, he is entitled to rescind it. A gift made subject to a condition, which is either immoral, illegal or repugnant to the nature of the grant is not necessarily bad. If the gift itself is good, it is upheld, the immoral, illegal or repugnant condition being ignored. But if the illegal condition be the consideration for the gift, and therefore an essential part of it, the condition failing the gift also fails. No condition can be superimposed upon a gift already completed. A man cannot give away his whole property so as to deprive the heirs of their maintenance, but the texts on this point do not appear to be more than prohibitory, and it has been held that if the donor give away the whole of his property, persons entitled to maintenance cannot enforce it as against the property in the hands of the donee. These are the principal features of a Hindu gift, and which when compared with the preceding commentary will be found to vary but little from the provisions of the Act. A party affecting to be but not actually a Hindu by descent and origin may be governed by a rule at variance with the Hindu law.¹

Under the *Dayabhaga* school of law a gift may be resumed should the donor become indigent.²

923. Effect of the section on Hindu law.—According to several cases, delivery of possession is deemed to be essential to complete a gift under the Hindu law. Assuming this to be the case, the next question, and one upon which the High Courts are by no means unanimous, is whether the provisions of the section overrule the corresponding provision of the Hindu law by which transmutation of possession is deemed to be essential. It is contended for those who regard sec. 123 as merely supplementary to Hindu law that all that the section enjoins is that a gift of immoveable property *must be effected* by a registered instrument, a thing quite distinct from the corresponding language used in the other parts of the Act, as in the case of instruments of sale, mortgage or lease where the expression used is "can be made only" or "can be effected only," thereby excluding all other

¹ *Fanindra Deb v. Rajeshwar Das*, I. L. R., 11 Cal., 463, P. C.

² *Dayabhaga*, Ch. II, § 57, see § 903, *supra*.

formalities by necessary implication.¹ It is on the other hand contended that the section cannot be presumed to be inexhaustive, and that there being nothing therein to invalidate a gift made in conformity with its provisions it must be held that the provision of the Hindu law is *pro tanto* overruled by the section. An argument founded upon a comparison of the language used in the Act would certainly not bear scrutiny, for the Act is in nowise consistent in its choice of expressions, and it is doing no violence to the language to assume that the word "must" is in its sense tantamount to the other two expressions elsewhere adopted in the Act,² and at any rate the language used in sec. 129 providing that nothing in the chapter shall, *save* as provided by sec. 123, be deemed to effect any rule of Hindu law distinctly points to an express departure made in favour by sec. 123, which abrogates the corresponding rule of Hindu law on the point. (See sec. 123, *ante*.)

924. Gifts under Mahommedan law.—A gift under the Mahommedan law may still be made by parol. Its three essentials are the same as under the Roman and Hindu law, *viz.*, offer by the donor, acceptance by or on behalf of the donee, and seisin. The necessity of the last has not been dispensed with by sec. 123, which has not been extended to a gift made by a Mahommedan. Hence the registration of a deed of gift between Mahommedans does not cure the want of delivery by the donor.³ It is not however necessary that the change of possession should be contemporaneous with the gift. If the donor has done all that he could do to perfect the contemplated gift, which is attended with complete publicity, the mere fact that possession was obtained by the donee some time after does not invalidate the transfer.⁴ In the case of a gift from a wife to her husband and *vice versa*, or from a father or other guardian to his ward, actual seisin is not required, and it is deemed to be a sufficient compliance with the requirements of law if the possession is thenceforward joint. But such possession would not in any other case support a gift.⁵ But it has been held in Madras that even in the case of a gift by a Mahommedan to his wife, there must be a change of possession, unless the gift be one for consideration (*hababil ewaz*), in which case alone it is valid even without transmutation of possession.⁶ When the donee is a minor, possession may be had by a trustee on his behalf.⁷ The possession required to be given is such possession as the nature of the property permits. There is nothing in Mahommedan law to make the gift of a zemindari, a part or the

¹ *Virepazappa v. Naniappa*, 2 Bom. L. R., 69; *Gorinda v. Malhari*, 3 C. P. L. R., 87; *Suri v. Pancham*, 5 C. P. L. R., 63.

² *Dharmodas v. Nistarini Dasi*, 1. L. R., 14 Cal., 440.

³ *Mohin-ud-din v. Manchershah*, 1. L. R., 6 Bom., 650; *Mogulsha v. Mahamad*, 1. L. R., 11 Bom., 517; *Meher Ali v. Tajudin*, 1. L. R., 18 Bom., 156; *Nizamuddin v. Abdul Gafoor*, ib., 364.

⁴ *Mahomed Bukah v. Hoseini Bibi*, 1. L. R., 15 Cal., 684, P. C.; *contra* in *Roshun Jahan v. Enaet Hossein*, 5 W. R., 4.

⁵ *Gakirnal v. Mukiambi*, B. P. J. (1898), 402.

⁶ *Mohomed Euph v. Pattanias*, 9 M. L. J. R., 185; *Khajooroonissa v. Loranah*, 1. L. R., 2 Cal., 197.

⁷ *Mohinudin v. Manchershah*, 1. L. R., 6 Bom., 630.

whole of which is let out on lease to tenants, invalid. In such a case the transfer of possession may be made by allowing the donee to collect the rents and profits.¹ And where the donee has already been in possession, there can be of course then no actual transfer, and in such a case an intention to transfer on the part of the donor unequivocally manifested is held to be sufficient.² A gift in which the donor retains possession after the gift is invalid.³ Thus where a document contained the words, "I have executed an *ikrar* to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any; but, after my death, you will be the owner, and also have a right to sell or make a gift after my death," it was held that since there could be no gift of a property *in futuro*, such a gift was invalid.⁴ A deed in which the donor declared, "I have adopted A B to succeed to my property" is neither a deed of gift nor a testamentary gift to take effect after the death of the donor, there being a complete absence of any relinquishment by the donor or of seisin by the donee.⁵ A gift in which there is no entire relinquishment of the subject-matter of the gift by the donor, is not valid.⁶ A deed of gift in which the donor recited "I have placed the aforesaid donee in proprietary possession of the aforesaid property as my representatives" followed by the mutation of names was held to be a sufficient transfer of possession so as to make the gift effectual.⁷ In a gift made in consideration of services rendered by the donee, called a *hiba-bil-uwaz*, or a gift for an exchange, the law regards the transaction as made up of two separate acts of donation, i.e., of mutual or reciprocal gifts of specific property between two persons each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered.⁸ A Mahomedan gift may be made with or without consideration, but in such a case the gift would take even though the consideration may fail.⁹ But where the gift is calculated to interfere with the course of the devolution of the property according to legal succession, the gift must be supported by at least some consideration otherwise it would be invalid.¹⁰ A death-bed gift is generally regarded in the light of a will, and is to be construed as such.¹¹

¹ *Mullick Abdool v. Muleka*, I. L. R., 10 Cal., 1, 112.

² *Ibrahim v. Suleman*, I. L. R., 9 Bom., 146.

³ *Zohoorooddeen v. Baharoolah*, W. R. (1904), 185.

⁴ *Yusuf Ali v. Collector of Tipperah*, I. L. R., 9 Cal., 133; *Umrao Bibi v. Jan Ali*, I. L. R., 20 All., 465; *Amtul Nissa v. Mir Nurudin*, I. L. R., 23 Bom., 489.

⁵ *Jewunt v. Jet Singhee*, 3 M. I. A., 245.

⁶ *Baba Saib v. Mahomed*, I. L. R., 19 Mad., 343; *Ibrahim Ali v. Ummat-ul-Zohra*, I. L.

R., 19 All., 267, P. C.

⁷ *Sajjad Ahmad v. Kudri Begam*, I. L. R., 18 All., 1; cf. *Ramchandra v. Rajs Rajit Singh*, I. L. R., 27 Cal., 242.

⁸ *Rahim Baksh v. Muhammad Haona*, I. L. R., 11 All., 1.

⁹ *Kamar-un-nissa v. Husaini Bibi*, I. L. R., 3 All., 266.

¹⁰ *Khajooroonissa v. Roushan Jehan*, I. L. R., 3 Cal., 184, P. C.; affirming *Roshan Jehan v. Enact Hossain*, 5 W. R., 4.

¹¹ *Lutejfoonissa v. Rajasoor Rukman*, 5 W. R., 84.

925. A gift may be made subject to any condition, but not to a condition which is immoral, illegal or repugnant to the nature of the grant. A gift accompanied by invalid conditions is in no way void, the invalid conditions alone being disregarded.¹ But a conditional gift, being dependent for its operation upon the performance of a condition, is void if the condition is invalid.² Where *wakf* is created in favour of a mosque, the *wakf* property cannot be alienated, and any person interested in the endowment can sue to have alienations set aside and the property restored to the trust.³

926. A death-bed gift, must have been made when the donor "Death-bed gift." was dangerously ill, or was suffering from diseases which actually cause death, or from those from which it is probable that death will ensue, so as to endanger in the person afflicted with the disease on apprehension of death. In all such cases the donor may make a gift, but it will be construed as no more than a testamentary disposition. But if the gift is made one year after the time he was first attacked by the illness, although at the time of making it he may not have recovered, the gift is then no longer regarded as a "*murg-ul-maut*,"⁴ provided that at the time of making the gift he was in full possession of his senses and there was no immediate apprehension of his death.⁵ When these conditions concur, the fact that the donor died soon after the gift is irrelevant since it is not then possible to say that he has died of that very illness.⁶ A gift made in consideration of a dower-debt being really in the nature of sale, has been held to be exempt from the restrictions applying to a death-bed gift.⁷

927. Conditional gifts.—A condition in a grant in which the donor stipulates that the donee would not alienate, or that at his death the property should return to his father is wholly void.⁸ So again a condition in a gift coupled with the condition that the donee was to receive only the interest during his life, and that after his death the subject-matter of the gift was to be held in trust for all his heirs is void, the gift being regarded as absolute.⁹ But a condition by which the donor reserves a certain income of share of the subject-matter of the gift for his own maintenance, and provides against its alienation, is valid and enforceable.¹⁰

928. "Musha" or "undivided."—No gift can be made of a *musha* or undivided part of an estate or where the interest

¹ *Mahomed Faiz v. Ghulam Ahmad*, I. L. R., 3 All., 490, P. C.; *Labbi v. Bibbun*, 6 N.-W. P. H. C. R., 150.

² *Roushan v. Enaet Hossain*, 4 W. R., 4, P. C.; *Busruf Ali v. Collector of Tipperah*, I. L. R., 9 Cal., at p. 138; *Chekkom v. Ahmad*, I. L. R., 10 Mad., 196.

³ *Kazi Hassan v. Sagan Balkrishna*, I. L. R., 24, Bom., 170.

⁴ *Labbi v. Bibbun*, 6 N.-W. P. H. C. R., 150.

⁵ *Mahomed Gulshere v. Marian Begum*,

I. L. R., 3 All., 781; *Ibbrah v. Suleman*, I. L. R., 9 Bom., 146.

⁶ *Lala Mahomed v. Dame Janbai*, I. L. R., 22 Bom., 17, P. C.

⁷ *Ghulam v. Hurnat*, I. L. R., 2 All., 864.

⁸ *Amiruddaula v. Nateri*, 6 M. H. C. R., 356.

⁹ *Suleman Kadr v. Dorab Ali*, I. L. R., 3 Cal., 1, P. C.

¹⁰ *Kasim Hussein v. Sharif-un-nissa*, I. L. R., 5 All., 285.

of each of several donees is not defined.¹ And it has been even held that where the subject-matter consists of property capable of division mixed with an undefined property the whole gift fails, unless the gift is made by a father to a minor son.² But in this respect the mandatory provisions of the Hanifia Code are far more stringent than those of the Imamia Code. According to the former, the gift of a share in undivided property, which admits of partition, is certainly invalid, but not so under the latter Code. But there may be circumstances in which even the stringency of the Hanifia school may have to give way. Thus where a Mahommedan bequeathed his property to his two nephews, Golam Rasul and Golam Ali, as joint tenants, and Golam Ali died, leaving a widow and a daughter, who continued to be joint tenants with Golam Rasul; but the latter continued in exclusive possession of the property, subject to any claim which they might establish to a share in, or charge upon the property. Golam Rasul, having by a written instrument, made a gift of that property to his younger son, the father of the defendants, disinheriting his elder son, the plaintiff, the gift was on account of the foregoing circumstances upheld.³ The law relating to the invalidity of such gifts ought to be confined within the strictest rules; and the authorities on Mahommedan law show that possession taken under a gift, even although that gift might with reference to *musha* be invalid without it, transfers effectively the property given, according to the doctrines of both the Shia and Sunni schools.⁴ The reasons given in the Hedaya for invalidating such a gift are first, that complete seisen being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, that if such gifts were allowed the donor will have to make a division, and thus a burden will be thrown upon him which he had not engaged for.⁵ These being then the reasons, the rule as to *musha* has been recently restricted in its application to only such cases as fall within its principle and reason. Accordingly where the donee's interest, although still undivided, is capable of distinct enjoyment by perception of the separate and defined rents belonging to them,—in accordance with the maxim *cessante ratione legis cessat ipsa lex*,⁶ the rule would then have no application.

929. Hiba and wakf distinguished.—A gift pure and simple, called *hiba*, must be distinguished from a *wakf*. The former may be called the gift proper, while the latter is the settlement in perpetuity of the *profits only* of the thing, the ownerships of which still continues to be vested in the donor.

¹ *Valimia v. Gulam Kadar*, 6 B. H. C. R., (A. C.), 25; *Nizam-ud-din v. Zabada*, 6 N.-W. P. H. C. R., 338.

² *Wajed Ali v. Abdool Ali*, W. R. (1864), 121.

³ *Gulam Jafar v. Maeludin*, I. L. R., 5 Bom., 288.

⁴ *Muhammad Muntaz v. Zubaida Jaa*, I. L. R., 11 All., 400, P. C.

⁵ *Hedaya*, Bk. XXX, c. 1. Vol. 2, p. 293; *Ameer-un-nissa v. Abed-un-nissa*, 23 W. R., 208, P. C.

⁶ "It's reasons failing the rule fails."

In the first case there is the transfer of the corpus or substance of a thing, but in the latter of only its usufruct, and from which it follows that *wakf* property cannot be alienated, and any person interested in the endowment can sue to have alienations set aside, and the property restored to the trust.¹ An attempt to give to the devisee under colour of a religious bequest an interest in contravention of Mahommedan law cannot be regarded as a *wakf* validly created.²

930. Revocation.—Under Mahommedan law gifts are encouraged on the ground that they tend to promote mutual affection; and so strongly is this principle inculcated that the retraction of gifts is allowed within only very narrow limits.³ Indeed under the Mahommedan law a gift once completed cannot be revoked without the decree of a Judge or the consent of the donee.⁴ But certain exceptions to the rule are allowed. Thus a gift made for the donee's own use, when the parties are not related, may be revoked.⁵

¹ *Kasi Haseen v. Sagun Balkrishna*, I. L. R., 24 Bom., 170.

² *Asghar Ali v. Karam Ali*, A. W. N. (1900), 98.

³ *Amina Bibi v. Katija Bibi*, 1 B. H. C. R., 157.

⁴ *Enayet Hossain v. Khoobunnisa*, 11 W. R., 320.

⁵ *Gulam Hussain v. Agi Ajam*, 4 M. H. C. R., 44; *Wajeed Ali v. Abdoel Ali*, W. R. (1834), 121; *Kulsoon v. Amceerunnessa*, 1 Hyde, 150.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

INTRODUCTION.

931. This chapter, on the transfers of actionable claims, aims at dealing comprehensively with the difficult question of the assignment of choses in action and includes an excursion into the law of champerty and maintenance. As originally enacted the chapter had been the subject of numerous conflicting rulings of the various High Courts; many difficulties in the construction and practical application of the chapter had arisen, and the necessity for legislation had therefore been made clear.¹ A Bill² was accordingly drafted with the object of removing the defects, which had from time to time been detected. It was in the ordinary course referred to the Select Committee,³ who considerably amended its provisions, and as amended by them it was passed into law on 2nd February 1900.⁴ Chapter VIII of the Act as originally enacted comprised 139 sections, but this number has been by the Amending Act reduced by 2, not reckoning the transposition of sec. 130 to under sec. 3, in place of which one new section taken from Act V of 1866 has for the first time been added (sec. 133). Of the remaining two sections one has been absorbed into sec. 130, and thus then the only section entirely eliminated from the Act is sec. 135,⁵ in regard to the interpretation of which the several High Courts were at variance. The rule owed its origin to the *Lex Anastasiana* by which a cessionary who had acquired a claim to recover a debt by purchase, or partly by purchase and partly by gift, could not claim from the debtor more than the money actually paid by him for the purchase together with interest, and

¹ Statement of Objects and Reasons on Act II of 1900.

² Bill No. 14 of 1899.

³ See their Report printed in the Appendix.

⁴ Act II of 1900.

⁵ This section ran thus: "Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expense of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of this section

applies—

(a) Where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

(b) where it is made to a creditor in payment of what is due to him;

(c) where it is made to a possessor of a property subject to the actionable claim;

(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment."

which had the effect of discharging the entire obligation. The rule was applicable only to unfair sales and was subject to the three exceptions reproduced in clauses (a), (b) and (c) of the section. The rule was no doubt directed against maintenance and champerty. But many difficulties were felt in its practical application. In England the rule had long since been abolished with the Usury Laws,¹ and the only country in which it was in force was this country and the colony of British Guiana. And in an appeal from the latter country to the Privy Council it was declared that the rule could not, consistently with the ordinary principles which regulate the administration of justice in England, apply that law to cases where there was no taint of unfairness.² The section, moreover, was of this character, that while it pressed, or might press, harshly against the honest transferee of a book-debt for which he had paid less than the amount of that debt, regard being had either to the risk or delay of recovery, he might find himself, when he sued to recover it, obliged to take such debt, less the cost which he had really paid for that risk. On the other hand it afforded no protection against dishonest dealing, and did not apply to cases of gift at all. It was, therefore, open to any one who desired to deal dishonestly, either to put forward the case of a transfer of an actionable claim as a gift or as a sale for a sum of money which he had not really paid. Moreover, the Courts of this country were at hopeless variance with one another upon this matter. The Courts of Allahabad³ and Madras⁴ took one view; Bombay⁵ agreed in part with Madras and in part with Calcutta.⁶ For these reasons the section was omitted altogether.⁷ The history of each section and of its transition into the present law will be found fully discussed under the heading of "Analogous Law" under the various sections.

932. In the Act originally an actionable claim was defined thus: "A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary."⁸ This definition was found to be inexact and indefinite, and was subjected to different interpretations at the hands of the different High Courts. Thus it was laid down by the majority of the

¹ *Jones v. Gordon*, 2 App. Cas., 616; The Usury Laws were repealed by 17 & 18 Vic., Ch. 90 (1854 A. D.).

² *Macrae v. Goodman*, 5 Moo. P. C., 336.

³ *Jani Begam v. Jahangir*, 1 L. R., 9 All., 480; *Hakim-un-nissa v. Deonarain*, 1 L. R., 13 All., 103; *Phulchand v. Chhotelal*, 1 L. R., 20 All., 327.

⁴ *Subbammal v. Venkatarama*, 1 L. R., 10 Mad., 289; *Nilkanta v. Krishnasawmy*, 1 L. R., 13 Mad., 225; *Ramchandra v. Venkatarama*, ib., 516; *Suryanarayana v. Ramamurti*, 1 L. R., 21 Mad., 253.

⁵ *Vishnu v. Dagadu*, 1 L. R., 19 Bom., 290; *Anand Rao v. Durga Bai*, 1 L. R., 22 Bom., 761.

⁶ *Rajani Kanth v. Hari Mohan*, 1 L. R., 12 Cal., 470; *Griah Chandra v. Kashisaveri*, 1 L. R., 13 Cal., 145; *Khosddeb v. Saran Mandol*, 1 L. R., 15 Cal., 436; *Rajendra Narain v. Watson & Co.*, 1 L. R., 18 Cal., 510; *Muchiram v. Ishan Chunder*, 1 L. R., 21 Cal., 568, F. B.; *Debendra Nath v. Pulin Behary*, 1 L. R., 24 Cal., 768.

⁷ See proceedings of the G.-G.'s Legislative Council (Appendix).

⁸ Sec. 130, Act IV of 1882.

Full Bench consisting of five Judges of the Calcutta High Court that a "mortgage" is an actionable claim,

What is an actionable claim.

within the meaning of the definition before cited.¹ "The claim is," said Petheram,

C. J., "to recover a sum of money which had been lent by the assignor of the plaintiff to the defendant, payment of which is secured by a mortgage: it is not an action to recover possession of the land, but to recover the money by sale of the security and other property of the debtors if the security is not sufficient. This is a claim which can be enforced by action and in no other way. I think the words of the Act are so clear that it is impossible for the Court not to give effect to them by holding that debts secured by mortgage are 'actionable claims' within the meaning of the whole chapter."² This view was dissented from by Prinsep, J., who observed that since the transfer of a mortgage "passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof,"³ it follows that where a debt is secured by the mortgage of specific immoveable property, the transfer by sale of the right to recover the money payable carries with it the right to recover it by foreclosure or sale as set out in the mortgage-bond, but in respect of interest only so much as may be due before the transfer, unless "a different intention is expressed or necessarily implied,"⁴ that is, unless the terms of the transfer should convey expressly or by implication all rights to recover such interest. But if a mortgage were an actionable claim, the debt would be "wholly discharged,"⁵ by the payment of the smaller sum which the assignee may have paid to the mortgagee. But "to do so would have the effect of entirely altering the form of the order which is to be passed in a suit for foreclosure under sec. 86 or for sale under sec. 88. This seems to show that the Legislature did not intend to bring a mortgage-debt within the terms of Chapter VIII."⁶ Prinsep, J., was of opinion that Chapter IV having dealt with the subject of mortgages exhaustively Chapter VIII was intended to deal only with ordinary and unsecured debts. Finally the learned judge hinted that the doubts expressed by him may be legislatively set at rest.⁷ Two years later a similar question having come up before the Allahabad High Court for adjudication, the point was referred to the Full Bench which laid down that the assignment for value of a mortgage before the due date of the mortgage, is not a sale of an actionable claim, or in other words, a transfer of a mortgage would constitute an actionable claim only, if a cause of action in respect of it had already matured and which, subject to

¹ *Muchiram v. Ishan Chunder*, I. L. R., 21 Cal., 568 (574), F. B. (Prinsep, J., dissentient); followed in *Rusick Lall v. Ramanath*, ib., 792; *Debendra Nath v. Pulin Behary*, I. L. R., 23 Cal., 718; I. L. R., 24 Cal., 763. To the same effect see also *Jagdeo v. Brij Behari*, I. L. R., 12 Cal., 506; *Nodun Mohun v. Puttarunniasa*, I. L. R., 13 Cal., 207.

² *Id.*, p. 574.

³ Sec. 8, ante.

⁴ *Id.*

⁵ Sec. 135, Act IV of 1862.

⁶ *Muchiram v. Ishan Chunder*, I. L. R., 21 Cal., 568 (560), F. B.

⁷ *Id.*, p. 581.

procedure, may be enforced by suit.¹ The Calcutta Full Bench case was also followed in Bombay,² and Madras.³ But nevertheless the definition was found to be somewhat too general.⁴ Hence in the Amending Bill⁵ the following additional clause was proposed to be added: "(2) Every actionable claim may be transferred subject to the restrictions and conditions imposed by Chapter II and by this chapter." To the section itself as amended by him the law member added the following note: "Probably sec. 130 as it stands in the present Act, may be taken as a fair working definition of the term *chose in action* as used in English law. The obvious intention of the Act was to make all choses in action transferable as property, that is to say, transferable subject to the conditions and restrictions imposed by secs. 6, 7, 9 and 10. But regard being had to recent differences of opinion, it is proposed to make the point clear by the addition of a second sub-section."⁶ The Bill having been referred to the Select Committee, the latter recommended its transposition from Chapter VIII to Chapter I, sec. 3, and changed the definition as follows:—

"Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.⁷

This definition was subsequently passed into law, and it must be therefore regarded as having departed from the view taken in the above Full Bench cases. The definition now given excludes from its purview mere rights of suit which by the Amending Act have been clearly made intransferable.⁸ The definition now adopted more closely coincides with the English conception of a *chose in action* which was for the first time made transferable by the Judicature Act, 1873.⁹

¹ *Shib Lal v. Armut-Ullah*, I. L. R., 16 All., 285, F. B.; *Rani v. Ajudhin Prasad*, I. L. R., 16 All., 815, F. B., referred to and explained; *Tota Ram v. Lala*, I. L. R., 20 All., 468. See also *Hakimunnissa v. Denonarain*, I. L. R., 13 All., 102.

² *Anand Rao v. Durgabai*, I. L. R., 22 Bom., 761 (762).

³ *Subbammal v. Venkatarama*, I. L. R., 10 Mad., 289; *Rathnaswami v. Subramanya*, I. L. R., 11 Mad., 56; *Ramachandra v.*

Venkatarama, I. L. R., 13 Mad., 516, F. B.

⁴ § 2, Report of the Select Committee (Appendix).

⁵ Bill No. 14 of 1899.

⁶ Statement of Objects and Reasons (Appendix).

⁷ Sec. 2, Act II of 1900.

⁸ Sec. 3, Act II of 1900; see Report of the Select Committee (Appendix).

⁹ 36 and 37 Vic., Ch. 66, sec. 25 (6).

An "actionable claim" may then be generally taken to mean "a claim to any debt" or beneficial interest other than those specified in the section, viz.—

(1). Debt secured by a mortgage of immoveable property or hypothecation or pledge of moveable property is not an actionable claim.

(2). A claim as such to any beneficial interest in moveable property is an "actionable claim;" but not if the property be in the actual or constructive possession of the claimant.

(3). A claim which the Civil Courts do not recognize as affording grounds for relief is not an "actionable claim."

933. The term "actionable claim" being then a claim to any "debt," it has to be seen what significance is intended to be attached to this word. Ordinarily, a debt is a sum of money due from one person to another. The sum of money or its equivalent

Examples.

must be a liquidated or certain sum affirmed to be due to him, generally on some contract alleged to have taken place between the parties, or on some matter of fact from which the law would imply a contract between them. In this acceptance of the term, stocks, debentures and shares are clearly choses in action.¹ An annuity² or a share in a partnership³ is a chose in action. A copyright or a patent is equally within the term.⁴ So where the co-sharers of a Hindu family, one of whom was a minor, owned certain immoveable property of which a perpetual lease was executed by all the co-sharers except the minor, on whose behalf however his elder brother acting as his guardian had signed the lease. On his attaining majority the co-sharer sued the lessees and the other co-sharers for a declaration of his right to and for possession of his share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sued all his interest therein. It was held that the purchase was an actionable claim being a right to set aside a document on the ground that the person by whom it was executed exceeded his powers.⁵ Similarly the vendor's right to receive the purchase-money after he has completed the sale, is an actionable claim being then a "debt" due from the purchaser.⁶ A contract for the delivery of shares at a future day is an actionable claim.⁷ A policy of life insurance,⁸ the right of a usufructuary mortgagee to obtain possession.⁹ A right to get by division a quantity of land which

¹ *Colonial Bank v. Whinney*, 11 App., 426.

² *Norcutt v. Dodd*, Cr. & Ph., 100. *Per Fry, L. J.*, in *Colonial Bank v. Whinney*, 30 Ch. D., 261 (260).

³ *In re Bainbridge*, 8 Ch. D., 218; see English Bankruptcy Act, 1888, sec. 50; *Domaty v. Ramen*, 1 L. R., 27 Cal., 98.

⁴ *Williams' Personal Property* (12th Ed., pp. 6, 30; *per Lindley, L. J.*, in *Colonial Bank v. Whinney*, 30 Ch. D., 261 (283).

⁵ *Rajani Kanth v. Hari Mohan*, 1 L. R., 12 Cal., 470 (472).

⁶ *Lamble in Ahmed-ul-din v. Majlis Rai*, 1 L. R., 8 All., 12.

⁷ *Dayabhai v. Dullabhram*, 8 B. H. C. R., 133; *Ripley v. MacClure*, 4 Exch., 845; *Ryall v. Rowles*, 2 W. & T. L. C., 670, 736.

⁸ *Lee v. Abdy*, 17 Q. B. D., 309.

⁹ *Rani v. Ajudhia Prasad*, 1 L. R., 16 All., 315, F. B.

had been reserved by him for his own use in a deed of gift is a chose in action.¹ In other words, a right to claim specific performance of an agreement to transfer land or a contract for the purchase of goods² is a chose in action.³ Similarly the right of a tenant to compensation against the landlord is also akin to such a right.⁴ A chose in action or an actionable claim must be distinguished from ownership, which though it is both actionable and transferable is not subject to the restrictive provisions of the chapter, the object of which is to prevent speculative trafficking only in choses in action. Thus where the owner of an estate transferred the right to catch elephants entrapped in a pit in the owner's land, and the right to sue for the recovery of such elephants from any person in possession of them, namely, elephants belonging to the grantor, the thing conveyed, was moveable property, though not actually in his possession. No doubt by acquiring ownership in the elephants, the plaintiff acquired the right of action, but only as incidental to his right of ownership.⁵ Similarly it has been laid down in another case that a transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession.⁶ The ownership of a property is not a *claim*, and therefore not within the mischief the chapter was intended to remedy. For the same reason a claim which has passed into a decree can no longer be regarded as an actionable claim.⁷ A debt existing or to become due are both assignable.⁸ This point is now quite clear, although under the chapter as originally enacted the point was by no means free from doubt.⁹ A *chose* means a "thing," and a chose in action means a thing to get possession of which an action must be brought. Similarly an "actionable claim" means a claim to assert which an action may be brought,¹⁰ or rather a thing which may be recovered by an action. Thus in an old case Lord Thurlow, speaking of stock or the funds, said: "Those things, such as stock, debts, &c., being choses in action are not liable."¹¹ The term was so used to distinguish property which could not be seized from property which was not in visible possession. It appears that the term has been since used to convey the same meaning.¹² A chose in action is simply a name opposed to a chose in possession.¹³ Thus says Blackstone: "Having

¹ *Rudra Perkash v. Krishna*, I. L. R., 14 Cal., 241.

² *Nitahar v. Magniram*, B. P. J. (1875), 162; *Narsingdas v. Magniram*, B. P. J. (1877), 226.

³ *Ib.*

⁴ *Yasudeva v. Damodaran*, I. L. R., 23 Mad., 86; *Achuta v. Kali*, I. L. R., 7 Mad., 545.

⁵ *Ramakrishna v. Kulikal*, I. L. R., 11 Mad., 445.

⁶ *Modun Mohun v. Fullarunnissen*, I. L. R., 13 Cal., 297.

⁷ *Aftal v. Rana Kumar*, I. L. R., 12 Cal., 610.

⁸ *Lett v. Morris*, 4 Sim., 607; *Brice v. Bannister*, 3 Q. B. D., 569 (573).

⁹ Under English law this was always the rule; see *Brice v. Bannister*, 3 Q. B. D., 569 (575); *Buck v. Robson*, *ib.*, 686; *Walker v. Bradford Old Bank*, 12 Q. B. D., 511 (516).

¹⁰ *Brook's New Cases* of the time of Henry VIII, Edward VI, and Queen Mary, Great Abridgment (Ed. 1675), p. 211.

¹¹ *Dundas v. Dutens*, 3 Ves. (Jun.), 196.

¹² *Eq. by Lord Denman in Humble v. Mitchell*, 4 A. & E., 205; *Wood, L. J.*, in *Ex parte Agra Bank*, 3 Ch., 555 (560).

¹³ *Colonial Bank v. Whinney*, 80 Ch. D., 261 (275).

thus considered the several divisions of property in possession, which subsists there only where a man hath both the right and also the occupation of the thing, we will proceed next to take a short view of the nature of property in action, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may, however, be recovered by a suit or action at law, from whence the thing so recoverable is called a thing or *chose in action*.¹ So again says Williams in his work on Personal Property²:—"Although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action or the liberty of proceeding in the Courts of law either to recover pecuniary damages for the infliction of a wrong, or the performance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman-French of our early lawyers, a *chose*³ or thing in action, whilst moveable goods were denominated choses in possession. . . . In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment by which our forefathers were happily ignorant, whilst canals and railway shares, and other shares in joint stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the Acts of Parliament under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as *choses in action*. They are, in fact, personal property of an incorporeal nature."⁴ The term "*choses in suspense*" is sometimes used synonymously with choses in action.⁵

130. (1) The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or

¹ Commentaries II, p. 396.

² (12th Ed.), p. 4.

³ "Chose" in Fr. means "a thing." Wharton's Law Lexicon, Art. "Chose."

⁴ Personal Property (12th Ed.), p. 7.

⁵ Brook's Abridgment cited in *Colonial Bank v. Whinney*, 30 Ch. D., 261 (286).

against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations.

(i). *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer, as prescribed in sec. 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(ii). *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A*'s executor, subject to the proviso in sub-section (1) of sec. 130 and to the provisions of sec. 132.

934. Analogous law.—This section corresponds with sec. 131 of the old Act which ran as follows :—

“No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer ; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer with the debt or property, shall be valid as against such transfer.

Illustration.

A owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, having no notice of the transfer, pays *B*. The payment is not valid, and *C* cannot sue *A* for the debt.”¹

In the Bill amending the Act it was proposed to modify the section by adding the words “ unless the transfer is in writing and unless and until ” after the words “ in whom the property is vested,”

¹ Sec. 131, Act IV of 1882.

the other verbal changes being consequent upon the modification. An exception and an explanation were also proposed to be added, and a similar addition was made to the illustration. In justifying the change the following note was added: "Secs. 131 and 132 of the existing Act are obviously founded upon sec. 25, cl. (b) of the Supreme Court of Judicature Act, 1873 ;¹ but successive amendments of the Bill while under consideration seem to have led to the reversal of each rule of the English law. In the first place, the Indian section is negative in its terms, while the English action is positive. The result is that the former prescribes a compulsory form of transfer for the specific class of actionable claims to which it relates, whereas the latter merely provides that certain consequences shall follow if this form of transfer be adopted. In the second place, the English section applies to all debts and other legal choses in action, but the Indian section applies only to debts and beneficial interests in moveable property. It is not clear what rule would apply in India to an actionable claim relating to both moveable and immoveable property ; nor is there any specific provision as to the actionable claims in respect of immoveable property. Further, it is not apparent why written notice to the debtor should not be required in the latter case. And, again, it is uncertain on the construction of the section, whether the term 'beneficial interest' is to cover a charge. The English section is confined to absolute assignments. In the third place, the English enactment requires the transfer itself to be in writing ; but the Indian Act is silent on the point, and, therefore, by virtue of sec. 9, the transfer need not be in writing. In the fourth place, the English Act requires express notice in writing to be given to the debtor. The Indian Act provides for three alternatives—express notice, the fact that the debtor is aware of the transfer, or the fact that he is a party to the transfer. The Indian Act then curiously goes on to provide that, where express notice is given, it must be given by the transferor ; whereas in practice, of course, notice is given by the transferee in order to complete his title.² It is thought best to legislate on the lines of the English Act so as to restore uniformity in the law of the two countries in so far as the same subject-matter is dealt with and these new sections have been drafted with that object."³

The Select Committee has not departed from this principle, and the section as now enacted must be taken to embody the principle above enunciated. The corresponding section of the English Statute upon the lines of which the present section has been drafted is as follows :—

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim

¹ 36 & 37 Vic., c. 60.

I. L. R., 21 Bom., 60 (2) cited, *post*.

² As to this point, see *Ragho v. Narayan*,

³ Notes on clauses, Bill No. 14 of 1899.

such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignees if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he thinks fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."¹

935. Principle.—This section has supplemented the several defects noticed in the corresponding old section. Thus, for example, the old section was silent as to the necessity or otherwise of such a transfer being witnessed by writing, and it was accordingly held that writing was not indispensable to effectuate it.² It was also silent on the point whether the assignee could sue in his own name without the concurrence of the assignor, although no doubt in practice such a course was permitted.³ But in one case it was held contrari-wise by the Calcutta High Court.⁴ The present section, however, now makes this point amply clear, by enacting in favour of the assignee's right to sue in his own name without obtaining the consent of the assignor, or joining him in the suit. The old section was again silent as to when an assignment was to be regarded as complete in law. Another point upon which the old section was by no means very clear, is the one about the effect of notice of transfer upon the debtor. Formerly it was held that the giving of a notice of transfer by the transferor or transferee to the debtor was by no means a *sine qua non* of a valid assignment, and this view is now clearly expressed in the section. The effect of the section is to safeguard the interests of the debtor, who may in ignorance of the transfer, continue to deal with the original creditor. Any notice to him must be *express*, and not constructive merely.

936. Meaning of words.—"The transfer . . . shall be effected only by the execution of an instrument." i.e., all assignments must be made in writing. There can be no longer a valid assignment by parol. An agreement to assign, must, however, be

¹ Supreme Court of Judicature Act, 1873, sec. 25 (b), 26 and 27 Vic., Ch., 66.

² *Autu Singh v. Ajundhia Shahu*, 1 L. R., 9 All., 249 (251).

³ *Krishna Chetti v. Balarama*, 1 M. H. C. R., 139; *Anonymous v. Muttusamiy*, ib., 140;

Kularbachu v. Rungasami, ib., 150; *Vembakum v. Moonenram*, 4 M. H. C. R., 176; *Kanhuiya v. Domingo*, 1 L. R., 1 All., 782.

⁴ *Raj Narain v. Universal Life Assurance Co.*, 1 L. R., 7 Cal., 194, in appeal 10 C. L. R., 661.

distinguished from an assignment as such. The former may be made in parol: the latter only is now required to be made in writing. "*Signed by the transfer:*" who may affix his mark if he is illiterate.¹ "*Or his duly authorised agent:*" This clause was scarcely necessary, for any transfer whether by sale, mortgage, or assignment, may be made by a duly authorized agent by force of the Indian Contract Act, and his power as agent to represent and act for the principal.² "*Effected and complete upon the execution, &c.,*" and not before. The assignment is complete simultaneously with the execution of the instrument. It is incomplete and confers no right on the assignee until the deed of transfer has been executed.³ "*And thereupon, &c.,*" This clause too would have been unnecessary, did it not direct attention to certain words which required explicit reference. Upon the completion of transfer, "all the rights and remedies of the transferor, *whether by way of damages or otherwise*, shall vest in the transferor, *whether such notice of the transfer as is hereinafter provided be given or not.*"

"*Every dealing with the debt or other actionable claim:*" "Debt" is used in relation to the dealing as between the debtor and creditor, and "actionable claim" in relation to the dealing in which the assignee may be a party. "*By the debtor or other person, &c.,*" i.e., the debtor would be unaffected by the assignment unless he receives an *express* notice. The "or other person" referred to includes the debtor's privies, executor or garnishee (see ill. ii).

"*Express notice:*" The term is taken from the English law, where a notice may be either express or implied, that is according to the Indian terminology it may be either actual or constructive.⁴ "*Where the debtor is a party*" in which case he is estopped from ignoring it. "*The transferee of an actionable claim, &c.,*" This clause is new, and lays down authoritatively what has been the recognized doctrine.

937. Transfer how made.—So far as regards this country, it is now for the first time laid down that an assignment of an actionable claim must be made by writing signed by either the transferor or his duly authorized agent. Such a writing may be made either on a separate paper or it may be as validly made by an indorsement on the bond or other chose in action intended to be transferred. Registration of the instrument is not indispensable, nor is the instrument invalid for want of attestation, or want of consideration which is not a necessity. No particular form of words have been prescribed or appear to be necessary, provided that the words used are sufficiently indicative of the transferor's intention to assign the chose in action.⁵ Where the words used are unequivocal the assignment is complete, whatever may have been the real intention of the transferor. Thus where the

¹ Sec. 8 (52), General Clauses Act (Act X of 1897).

² Sec. 182, *et seq.*, Act IX of 1872.

³ Cf. *Dakshina Mohan v. Srimati Basunati*,

⁴ C. W. N., 474.

⁵ See sec. 3, *ante*, and §§ 23–26.

⁶ *Roe v. Dawson*, W. & T.'s L. C. (6th Ed.), 790.

document ran thus: "I hereby assign to Messrs. R. & Son the sum of £40 now due or that may hereafter become due in respect of the steam launch which I am building for you," it was held that the letter constituted an assignment of the debt and not an order to pay.¹ These two classes of instruments must be clearly distinguished. For while in the ordinary acceptation of the term an order for the payment of money presupposes moneys of the drawer in the hands of the party to whom the order is addressed, held on the terms of applying such moneys as directed by the order of the party entitled to them, no such obligation arises in the case of an assignment. Again, if the order is one for the payment of money, the liability of the drawee would be not to the payee but to the drawer. If a purchaser buys goods of a manufacturer or a tradesman, he undertakes to pay the price to the seller, not to a third party, who is a stranger to the contract, nor will the mere order or direction of the seller to pay to a third party impose any such obligation upon him; it is only when and because the right of the seller to the price has been transferred to the third party by an effectual assignment that the assignee becomes entitled as of right to the payment.² An order for the payment of money is again revocable by the drawer, unless the drawee has taken action thereon. It fails altogether on his death, but not so an assignment. Thus where in a case one Gough gave the plaintiff an order addressed to the defendant in the following terms: "I do hereby order, authorize, and request you to pay to Mr. William Brice, Solicitor, Bridgwater, the sum of 100 out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge," and by the plaintiff notice in writing of the above-mentioned instrument was given on the same day to the defendant, it was held that having regard to the plaintiff's intention and the fact that he gave notice of the transfer immediately to the defendant, the instrument constituted a valid assignment, of the sum named therein and that the plaintiff was therefore entitled to recover the amount from the defendant, notwithstanding the subsequent payment of that amount by him to the assignor.³ One way of distinguishing an order for payment of money from an equitable assignment is that while the latter specifies the particular fund or debt out of which the payment is to be made, the former is a mere direction to pay and in it there is no specified fund which alone can be the subject of an equitable assignment. Thus an order "please pay, Mr. Percival the amount of his account and oblige,—£42 14s. 6d. for goods delivered at Park" is no more than a mere order for payment of money,⁴ but it would be an

¹ *Buck v. Robson*, 3 Q. B. D., 686 (692); *Brice v. Bannister*, ib., 689, followed; *Ex parte Shellard*, 17 Eq., 100, disapproved; and *Ex parte Hall*; *In re Whitting*, 10 Ch. D., 615.

² *Per Cockburn, C. J.*, in *Buck v. Robson*,

3 Q. B. D., 686 (691, 692).

³ *Brice v. Bannister*, 3 Q. B. D., 500; approved in *Ex parte Hall*; *In re Whitting*, 10 Ch. D., 615.

⁴ *Percival v. Dunn*, 29 Ch. D., 128; *Burn v. Curvelho*, 2 My. & Cr., 690 (702).

assignment if the money was payable "out of the money due to me from Horace Walpole, and what will be due at Michaelmas."¹ Another circumstance which may be looked to for the purpose of distinguishing an assignment from a mere order of authority for payment is that of consideration. Thus in a case where the landlord ordered his tenant to pay a sum of money to his bankers from whom he had borrowed £200, and the instrument ran thus "when your Michaelmas rent becomes due to me, I hereby authorize and request you to pay to Messrs. Hall & Co. of Brighton, £200 to my credit, for which I will accept their receipt as so much of your rent discharged" it was held that since the letter contained no reference to the loan, and did not show that any consideration had been paid therefor, it could not be regarded as amounting to anything more than a revocable authority to pay. Said Bacon, C. J., in deciding the case: "Now what are the circumstances of this case? A man in want of money applies to his bankers and says, 'I am the owner of a farm; the rent is payable next Michaelmas day, and, if you will let me draw on you for £200, I will give you an order upon the tenant to pay you that amount out of the rent when it becomes due to me.' That is the real transaction, and what does it amount to more than this, that a man says to his bankers, I am entitled to receive some rent, and you shall have out of it £200 when it becomes due to me at Michaelmas."²

938. But while the question of consideration and the surrounding circumstances are no doubt material for the purpose of determining the real nature of the transaction, it is not to be assumed that consideration is in every case essential to support an assignment. On the other hand, as has been observed before, although consideration is by no means a prerequisite of a valid assignment,³ it becomes material where the question of fraud, or unfair dealing is raised. Again, if the assignment is incomplete, the question would be material since equity disfavours the enforcement of voluntary transfers.⁴ To quote the words of Wills, J.: "The rule in equity comes to this; that so long as a transaction rests in expression of intention only, and something remains to be done by the donor to give complete effect to his intention, it remains uncompleted, and a Court of Equity will not enforce what the donor is under no obligation to fulfil. But when the transaction is completed, and the donor has created a trust in favour of the object of his bounty, equity will interfere to enforce it. The reason why equity will not interfere in favour of a mere volunteer, but requires a valuable consideration for the transaction, is that in such a case there is nothing wrong in the donor changing his

¹ *Row v. Dawson*, 2 W. & T.'s L. C. (6th Ed.), 796.

² *Ex parte Hall; In re Whitting*, 10 Ch. D., 615.

³ *Kachu Bayaji v. Kuthoba*, 10 B. H. C. R., 401; *Tukaram v. Buhirav*, B. P. J. (1898),

7; *Manishankar v. Bai Mali*, I. L. R., 12 Bom., 686 (690).

⁴ *Woodford v. Charuley*, 33 Beav., 96; *Bixey v. Flight*, 24 W. R. (Eng.), 957; *In re Patrick v. Tatham*, L. R. (1891), 1 Ch., 82 (87).

mind and withholding from the object of his liberality the contemplated benefit. But if there is value given on the one side in exchange for the donor's intention, then there is a contract or something approaching to a contract, between the parties and the donor cannot withdraw from his expressed intention."¹

939. Assignee's rights upon transfer.—An assignment being complete without the consent of the debtor, it is necessary to see how far the latter is affected by it. As against the assignor there can be no doubt that by the fact of the assignment, the assignee acquires rights which he cannot gainsay. But has the debtor the option of refusing to recognize a transfer to which he was not a party and which he would not have consented to if he had been consulted? There can be no doubt that the debtor has accepted liability which he is bound to discharge, and there is no reason in equity or law why he should not discharge it to the assignee rather than to the original creditor. And so it has been laid down in the section which in this respect reproduces the terms of sec. 133 before the amendment. The same rule is enacted in England.² All that the debtor can justly claim is that by the fact of assignment he shall be not placed in worse position than if the assignment had not taken place. And this right has been expressly reserved to him.³

Under sec. 133 before its amendment the point was, however, by no means clear. The section enacted: "*On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless where the debtor resides or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.*" With regard to this section it was observed in the notes appended to the amending Bill: "It is difficult to understand sec. 133 in its present form. The intention apparently was to adapt the English provision above referred to, which is to the effect that on notice to the transferee, the transfer is effective to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. The reference to international law seems out of place in its present context as municipal law is always construed, subject to the provisions of international law, and the latter, if it is to be dealt with at all, should be dealt with separately as in Chapter XVI of the Negotiable Instruments Act, 1881 (Act XXVI of 1881). The provision as now drafted will perhaps sufficiently reproduce the English law on the point, while avoiding any reference to the distinction between legal and equitable remedies."⁴

¹ *Harding v. Harding*, 17 Q. B. D., 442 (444).

Brice v. Bannister, 3 Q. B. D., 569 (574).

² S. 132, *post*.

³ Supreme Court of Judicature Act, 1873
(36 & 37 Vic., Ch., 66), sec. 25, sub-sec. 6;

⁴ Statement of Objects and Reason (Appendix).

940. The validity of an assignment must be regulated by the law of the *lex situs* of the debt, and the liability of the debtor by the law governing the contract between him and the creditor.¹ Hence if the assignment is made where by the *lex loci rei sitae* the same is invalid, no property would pass and the debtor is not bound by it. But "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere."² The same view was taken by Kay, L. J., in another case: "The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant's rent, and the purchaser acquires a perfect title, whatever may be the law of the owner's domicile. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law."³

Similarly where the master of a Prussian vessel sold the goods of an Englishman, which were on board his ship in Norway, under circumstances which gave the purchaser no title according to English law, but a good title according to the law of Norway, it was held that the law of Norway must govern the transaction, and that the property had passed to the purchaser.⁴ In another case a bill was drawn in Brussels on an acceptor in London, and indorsed in France, the question as to the right of the indorsee to sue, was held to depend upon whether the indorsement was valid by French law.⁵ And in another case the assignment in Cape Colony of an English policy of life assurance, which assignment was valid by English law but invalid by the law of the Colony, was held to confer no title in England.⁶ It may then be taken to be settled that a transfer abroad of a document of title is governed by the law of the place of transfer,⁷ that is the transferor's domicile.

In the case of judgment-debts, so far as any locality can be ascribed to them, they are generally deemed to be incurred in the place where the judgments were passed and where they would be executed; and consequently the law of that place must regulate the liabilities of the judgment-debtor, wherever the assignment might have been made, and the debtor cannot seek to lessen his liability as it cannot be increased by recourse to the law of the place of assignment.⁸ A debt arising in one country may be discharged by the laws of that country, and such a discharge, if

¹ *Pythelingam v. Sektaramaiyar*, 10 M. L. J. R., 77; *Dicoy's Conflict of Laws*, Rule 141, p. 533.

² *Cammell v. Sewell*, 29 L. J. (Ex.), 353; *Alcock v. Smith*, L. R. [1892], 1 Ch., 268; cf. *Varden Sette v. Luckpathy*, 9 M. I. A., 307 (324, 325).

³ *Alcock v. Smith*, L. R. [1892], 1 Ch., 238 (267, 268).

⁴ *Cammell v. Sewell*, 29 L. J. (Ex.), 350; *Hooper v. Gumm*, L. R., 2 Ch., 232; *Castriquas*

v. Imrie, L. R., 4 H. L., 414; *Williams v. Colonial Bank*, 16 App. Cas., 267 (272).

⁵ *Bradlaugh v. De Rin*, L. R., 3 C. P., 538; L. R., 5 C. P., 473.

⁶ *Lee v. Aday*, 17 Q. B. D., 309.

⁷ *Per Lopes*, L. J., in *Alcock v. Smith*, L. R. [1892], 1 Ch., 238 (260).

⁸ *Pythelingam v. Sektaramaiyar*, 10 M. L. J. R., 77; *Dicoy's Conflict of Laws*, Rule 141, p. 533.

it extinguishes the debt and not merely interferes with the remedies or the procedure to enforce it, will be effectual answer to the claim, not only in that country but in every other country.¹

941. Proviso.—The effect of a duly executed assignment is to transfer the thing assigned absolutely to the assignee. The latter is then entitled to the same legal incidents as the assignor. The giving of a notice to the debtor is not essential to complete the transfer in favour of the assignee. But if notice is not given to the debtor, the latter cannot be expected to attorn to the assignee. And if therefore in ignorance of the assignment, he has paid the debt to the assignor or to a subsequent assignee who has given him notice, the first assignee will have then no remedy against either the debtor or the subsequent assignee. In other words, the effect of not giving notice is to let in all equities which may exist or be created prior thereto,² that is to say, such equities which existed or have arisen out of circumstances existing before notice is given of the assignment.³ Apart from this, a notice may be given at any time.⁴

But while the assignee cannot hold the debtor liable if he has in ignorance of the assignment paid off the debt to the assignor, the latter cannot be allowed to derogate from his own grant, but must account to the assignee for anything received by him from the debtor. In every assignment there is an implied covenant on the part of the assignor that he will not do anything in derogation of his deed.⁵ He cannot be allowed to thwart and impede the remedy of the assignee, and may be restrained by a perpetual injunction if he attempt to break through his covenant.⁶ And it has been even held that where by a voluntary settlement the assignor assigned certain debts to trustees and subsequently died intestate as it appeared after receiving the debts himself, the trustees were entitled to prove as creditors against the estate of the intestate in respect of the debts received by him, although they had given no notice to the debtors.⁷ In this case it was thrown out, that if the assignment had not been complete, the trustees could not have ranked as creditors, for there can be no specific performance of a contract in favour of a volunteer. As Chitty, J., in one case said: "It is unnecessary to say in the case of a gift, the gift must be complete, and equity will not assist in completing an imperfect gift, though it is equally plain that equity will protect a donee who by a valid gift has obtained the title to the enjoyment of the thing that has been given."⁸

¹ *Murugesu v. Anumalai*, 10 M. L. J. R., 30.

² *Walker v. Brulford Old Bank*, 12 Q. B. D., 511 (517).

³ *Brice v. Bannister*, 3 Q. B. D., 560 (578).

⁴ *Walker v. Brulford Old Bank*, 12 Q. B. D., 511 (517).

⁵ *Aulton v. Atkins*, 25 L. J. (C. P.), 220;

Gerard v. Lewis, L. R., 2 C. P., 305.

⁶ *Jeffs v. Dny*, L. R., 1 Q. B., 372; *Wodehouse v. Farebrother*, 25 L. J. (Q. B.), 18.

⁷ *In re Patrick Bills v. Tatham*, L. R. [1891], 1 Ch., 82 (87); *Fortescue v. Barnett*, 8 My. & K., 36.

⁸ *Hardinge v. Colden*, 45 Ch. D., 470 (474).

Generally speaking then there is a two-fold advantage in giving notice of assignment upon transfer. It prevents the debtor from dealing with any other person, and in the case of a competition between two assignees it gives priority to him against even prior assignees without notice. But this is only *cæteris paribus*, for if two assignees have given notice simultaneously then the equitable rule, *Qui prior est tempore potior est jure*, would naturally prevail. The rule in this respect is the same in regard to mortgage-debts. (§§ 538—543.)

942. A premature notice is no notice at all. The notice contemplated by the section must be given upon the completion of the assignment. Thus in a case where the commission money payable to a military officer on retirement was paid to his agent on the 29th March, and he actually retired on the 16th May, and the first incumbrancer gave notice on the 29th March, and another notice on the 21st May, the second and third incumbrancers gave notice both on the 17th of May, it was held that the first notice given before the retirement was of no avail, as the money though ear-marked for payment to the officer was not actually transferred in law, and that therefore the second and third incumbrancer must take priority over the first whose valid notice was five days after theirs.¹ When there are conflicting rights between subject and subject for the determination of which it is necessary to ascertain the actual priority, the law will take notice of the fractions of a day. Thus if the equities are otherwise equal, the giver of notice at say 10 A.M., will have priority over another whose notice was delivered in the afternoon of the same day.² The delivery of notice is said to be for many purposes tantamount to possession. "If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he had acquired a title, in the actual possession and under the absolute control of another person."³ The doctrine upon which notice is necessary, is then a branch of the broad rule that you must do your best to perfect the transfer of possession, and the notice really goes as far towards equitable possession as you can go, because you affect the person with notice who has actual control of the fund. In order to go as far as you can towards equitable possession, you must direct your steps straight to the person in whose hands the fund is. He is the person who has the control of it, and he is the person who alone ought to be dealt with as far as notice is concerned. If therefore, you have two sets of funds in the hands of two sets of persons, notice to one set is not sufficient notice to both, you must give notice to both. If you only give notice to one set, you have only given notice to those who are in possession of a part.⁴ The doctrine that an assignee of

¹ *Johnstone v. Cox*, 16 Ch. D., 571.

² *Tomlinson v. Bullock*, 4 Q. B. D., 230 (332); *Johnston v. Cox*, 16 Ch. D., 571 (575).

³ *Dearle v. Hall*, 3 Russ., 1.

⁴ *Mutual Life Assurance Co. v. Langley*, 23 Ch. D., 460 (471); *Ryall v. Bowles*, 1 Ves., 348.

an equitable interest without notice of an existing prior assignment may gain priority simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee, is, it appears quite a modern doctrine, which appears to have had its origin in the case of *Dearle v. Hall*¹ decided in the first instance by Sir Thomas Plumer in 1823. At that time under the Bankruptcy Act then in force, in the case of an assignment of a chose in action, notice was requisite in order to take the property out of the order and disposition of the assignor. And it was the practice of conveyancers upon the purchase or mortgage of a chose in action or any equitable interest to require notice of the sale or mortgage to be given to the person who had the legal title—a very proper precaution in order to avoid the statutory consequences of bankruptcy, and expedient in every case in order to prevent the legal owner parting with the property to the assignor, as he would of course be justified in doing at the proper time, in the absence of a notice of assignment. This doctrine, then, originally confined to bankruptcy proceedings, gradually became assimilated to the general principles of equity.²

943. Nature of notice.—The notice to be given to the debtor must be an *express* notice, that is, an actual notice of the transfer. As Lord Cairns said in one case: “But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.”³ In other words, the notice must directly inform the debtor that a transfer has taken place. It need not be couched in any formal language, if it is sufficient to have in some way brought the mind of the debtor to an intelligent apprehension of the nature of the transfer, so that a reasonable man, or an ordinary man of business, would act upon the information. A notice may be in the form of a letter so long as it is explicit. It should in effect say: “Take care to have a note of it so that you may protect yourself against any mistake, and if anybody asks you whether you have received notice, recollect that there is this notice which ought to prevent your doing anything further,”⁴ or “Mind and remember this, and if anyone inquires of you, inform him that the trust fund is incumbered.”⁵

¹ 8 Russ., 1.

² *Ward v. Duncombe*, L. R. [1893], App. Cas., 209 (398); *Timson v. Ramsbottom*, 2 Keen., 35, reflected upon.

³ *Shropshire Union, &c., Co. v. The Queen*, L. R., 7 E. & L. at p. 506; cited and

followed in *Ward v. Duncombe*, L. R. [1893], App. Cas., 209 (391).

⁴ *Saffron Walden, &c., Society v. Rayner*, 14 Ch. D., 406 (411).

⁵ *In re Tichener*, 35 Beav., 317.

944. In England such a notice may be by parol,¹ but in this country this is insufficient. Even in England the Courts regard with disfavour a parol notice. Thus in one case Lord Cairns, L. C., said: "Now there is no doubt, with regard to property

Notice must be in writing.

of the kind in question here, that an equitable incumbrancer, if he has any regard for his own interests—any desire to make his position secure—will take very good care himself to give direct and distinct notice, and I will even go further and say...to give it in writing to the trustees of the property on which he has obtained his incumbrance; and if he does not do that, he will be at very great peril, because he will have to encounter, first, the danger of the trustee being left in entire ignorance of the security, and next, if he attempts to prove knowledge of the trustee *aliunde*, the difficulty which this Court will always feel in attending to what are called casual conversations, or attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been if he had got distinct and clear notice from the incumbrancer."² This view was in accord with sec. 131 before its amendment, but now the express notice must in every case be in writing as hereinafter provided in sec. 131. A notice need only be given once, and it is not necessary, and indeed it would be inequitable if the assignee were required to give notice upon the death of each trustee or obligor. As Lord Macnaughten observed: "But it may be that when an assignee or mortgagee has once discharged that duty he has done all that the rule requires of him, and that for the rest the law holds as Lord Cairns lays it down, and that he is not, on a change of trustees, to be deprived of his pre-existing equitable title by the diligence or by the happy thought of a subsequent incumbrancer. Certainly, I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think, would be less likely to conduce to the security of equitable titles."³ And similarly it has been recently laid down that where an assignee of an interest in a trust fund has perfected his title by notice to the trustees for the time being, he does not lose his right to priority over a subsequent assignee by reason of the fact that the prior assignee had given no notice to the new trustees appointed on the death or retirement of the old trustees, while the subsequent assignee had so given notice.⁴ This case must be distinguished from the other cases, such as *Timson v. Ramsbottom*⁵ and *In re Hall*,⁶ in which the prior assignee having given notice to one only of the several trustees was postponed to a subsequent assignee who took his assignment after the death of

¹ *Lloyd v. Banks*, L. R., 3 Ch., 488.

² *Id.*, p. 490.

³ *Ward v. Duncombe*, L. R. [1898], App. Cas., 360 (395).

⁴ *In re Waddell; Britton v. Partridge* [1899], 1 Ch., 108.

⁵ 3 Keen, 25.

⁶ 7 L. R., Ir., 180.

the trustee, and give notice of it to the other trustees in existence at the time.¹

A person who without any notice of the prior incumbrance takes the security, is not debarred from perfecting that security, merely on account of the subsequent notice.²

945. Constructive notice.—Under the corresponding section before its amendment, the clause ran thus: “Until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer.” The words italicised have been now struck out, the effect of which is that a constructive notice

would in no case avail against the debtor or the person in whom the property is vested unless he was himself a party to the assignment. Hence the service of a writ on the debtor in a suit on the assignment against him by the assignee is no longer a sufficient notice of the transfer, and the cases so decided under the clause now amended must be regarded as no longer authoritative.³ When the debtor is himself a party, the transaction partakes of the nature of a tripartite agreement by which there is a transfer of the thing as between the assignor and the assignee and acceptance of the liability by the debtor; or in other words, in such a case the assignor on the one hand, transfers to the assignee the debtor, and on the other the debtor attorns to the assignee.⁴ Thus in a case, where the defendants, who were executors and trustees, under a will, sent to G, one of the residuary legatees, a statement of account shewing a balance to be due to him an account of his share of the residuary estate, and G, who lived in Australia, sent this account to his daughter, the plaintiff, with the following direction on it, in his handwriting: “I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shewn in the above statement. . . .” Notice in writing of this document was given by the plaintiff to the defendants, but they refused to be bound by it. It was held that the document was a valid assignment of the balance in the hands of the defendants, and that the plaintiff was entitled to recover the amount. “When the subject-matter of the transaction is an equitable right or estate, and a legal title cannot be given, then if the settlor has done all in his power, and nothing remains to be done by him, equity regards it as though he had completed the legal title and gives effect to his intention.”⁵

946. Transferee's right to sue in his own name.—In England, the assignee is not at liberty to sue in his own name,

¹ See *In re Waddale; Britton v. Partridge* (1899), 1 Ch., 168.

² *Mutual Life Assurance Society v. Langley*, 32 Ch. D., 460 (1878).

³ These cases are *Lala Jugdeo v. Brij Behari*, 1 L. R., 12 Cal., 505; *Suddammal v. Venkatarama*, 1 L. R., 10 Mad., 289; *Kalka Prasad v. Chandan Singh*, 1 L. R.,

10 All., 90; *Ragho v. Narain*, 1 L. R., 21 Bom., 60.

⁴ *Gunga Prasad v. Chanrawati*, 1 L. R., 7 All., 256; *Annu Singh v. Ajudhia Sahu*, 1 L. R., 9 All., 249; *Tatlock v. Harris*, 3 T. R., 174.

⁵ *Harding v. Harding*, 17 Q. B. D., 442 (1845).

but must sue in the name of the assignor, or make him a party to the action.¹ But in this country the practice has always been in favour of the assignee's right to sue in his own name without impleading the assignor. This practice has now met with authoritative recognition in the section, which now expressly declares that the transferee may upon the execution of the deed of assignment sue or institute proceedings for the same without having to obtain the consent of the assignor and without impleading him in the suit.

947. Principle inapplicable to immoveable property.

—According to English law as well as by the definition of "actionable claim" now adopted in the Act, the doctrine of notice as affecting priority does not extend to transfers of interests in immoveable property. Such transfers are, no doubt, made subject to the provisions of sec. 48, and in the case of a mortgage also sec. 78; but in no case is a notice necessary to complete an assignment, or to confer priority in respect of it. Thus in one case it was observed by Sir W. Grant: "A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage had been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it, but by paying the money. Therefore he, who has the estate, has in effect the debt, as the estate can never be taken from him except by payment of the debt. With regard to the mere bond or covenant, which perhaps may accompany the mortgage, it is said, that all the ceremonies, declared to be necessary as to debts in general, ought to be observed. But it is difficult to say the mortgage passes, and is well assigned to one person, and yet the debt remains in another. It is impossible, that it can be so divided. Therefore by the assignment of the mortgage the debt necessarily passes, as incident to it, and it is clear that, to constitute a valid assignment, notice to the mortgagor is not necessary."²

131. Every notice of transfer of an actionable

Notice to be in writing, signed.

claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

¹ *Id.*, p. 517; *National Provincial Bank v. Harle*, 6 Q. B. D., 626; *Burkinson v. Hall*, 12 Q. B. D., 247; *Tancred v. Delagoa Bay Co.*, 23 Q. B. D., 239; *English and Scottish Investment Co. v. Brunton*, L. R. [1892], 2 Q. B., 7.

² *Jones v. Giddons*, 9 Ves., 407 (410); *Ex parte Mackay*, 1 M. D. & D., 550; *Ex parte Barnett*, 1 De G., 194; *In re Hughes' Trusts*, 2 H. & M., 89 (94); *In re Richards*, 45 Ch. D., 589 (596); *Hopkins v. Hensworth*, L. R. [1898], 2 Ch., 347; *Govindra v. Rautji*, 1 L. R., 12 Bom., 22.

948. Analogous law.—This section was originally sec. 132 and stood thus: "Every such notice must be in writing, signed by the person making the transfer, or by his agent duly authorized in this behalf." In the Bill the words "by the *transferor or transferee*" were proposed to be substituted in place of "by the person making the transfer" out of deference to the ruling in *Ragho v. Narayan*,¹ in which Farran, C. J., had observed: "Before the passing of the Transfer of Property Act, it was the assignee upon whom it was incumbent for his own protection to give notice of his assignment to the debtor. There was no particular reason why the assignor should give it. We cannot help thinking that there has been a slip made in sec. 132 in throwing upon the person making the transfer, the obligation of giving express notice to the debtor." The Bill having been made over to the Select Committee for report, they altered the section to its present form, justifying the change as follows: "In sec. 132 (now 131), we propose to enact that a notice of transfer shall be signed by the transferor, or his agent, or in case of the transferor's refusal, by the transferee, and shall state the name and address of the transferee. The latter part of this rule goes beyond the requirements of the English law, but we submit that a notice in general terms, not stating the name and address of the transferee, would not be sufficient as a safeguard against fraud. A debtor is, we think, entitled to know the name and address of the person to whom he becomes liable on a transfer of the claim against him."²

Under English law only an express notice in writing is required (but see § 940). It does not enact who is to give it, and it is allowed to be given either by the assignee or assignor, and will hold good even if it is given after the death of the assignor.³

949. Principle.—Primarily the duty of giving notice of transfer is cast upon the transferor, failing whom the transferee is empowered to give it. In either case the name and address of the transferee is an integral part of a valid notice and must be communicated to the debtor or other person to whom it is given. In the Bill amending the Act, it was proposed to enable the transferee to give notice, but the proposal was not accepted by the Legislature probably because such a course might lead to fraud inasmuch as a transferee may give notice either before the assignment is duly made, or in fraud of the assignor. For if notice given by an assignee were valid, any one might arrogate to himself the position, and realize from the debtor a debt of which the assignor may not have made any transfer at all.

950. Contents of notice.—A notice of transfer is sufficient if it states the name of the transferor, and the fact and date of the assignment to the transferee. If the transferee is a company, the name of the manager or other person duly authorized

¹ I. L. R., 21 Bom., 60 (63).

² Report of the Select Committee (Appendix).

³ 36 & 37 Vic., Ch. 66, sec. 25; *Walker v. Bradford Old Bank*, 12 Q. B. D., 511; cited in *Ragho v. Narayan*, I. L. R., 21 Bom., 60.

to act in the name and on behalf of the company should be disclosed. If the assignment is on trust, the name of the trustee should be mentioned. And if the fund is in Court, the assignee must apply to the Court for a stop order.¹

132. The transferee of an actionable claim shall

**Liability of transferee
of actionable claim.**

take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations.

- (i) *A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.*
- (ii) *A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.*

951. Analogous law.—This section corresponds with sec. 137 of the Act before its amendment, and which ran thus :

“137. The person to whom a debt or charge is transferred, shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Illustration.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.”²

In the Bill the section was proposed to be thus amended :

“134. The person to whom an actionable claim is transferred, shall take it subject to all the liabilities, defences and priorities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations.

- (i) *A debenture is issued in fraud of a public Company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.*
- (ii) *A, the holder of a policy of insurance, assigns it to B for value. Before notice of the assignment is received, A has contracted a debt of Rs. 300 with the Insurance Company. The Company can set off this debt against the transferee.”*

To this draft-section the following note was appended : “The provisions of sec. 137 of the existing Act have been made

¹ *Mutual Life Assurance Society v. Langley*, 23 Ch. D., 460.

² This illustration was taken from *Athenum Life Assurance Society v. Pooley*, 3 De

G. & J., 294; animadverted upon in subsequent cases, see *In re Hercules Insurance Co.*, L. R., 19 Eq., 302; *Easton v. London Joint Stock Bank*, 24 Ch. D., 96 (117).

general so as to apply to all actionable claims. The phrase 'subject to all the liabilities' appears to have been adopted as the equivalent of the English phrase 'subject to all equities entitled to priority over the right of the assignee,' as it may be thought desirable to avoid the technical term 'equities,' the words 'all the liabilities, defences and priorities' have now been used instead."

The section was finally re-cast by the Select Committee with the following note: "In sec. 134 (now 132) we have substituted the expression 'all the liabilities and equities entitled to priority over the right of the transferor,' for the expression 'all the liabilities, defences and priorities to which the transferor was subject.' The illustrative cases appended to this section, being, we think, open to criticism we have endeavoured to provide illustrations taken from the English law reports which exhibit more clearly the actual working of the rule laid down."¹ Finally, the section received its finishing touches at the hands of the Council when on the motion of the Hon'ble Law Member the words 'the liabilities and equities entitled to priority over the right of the transferor' were omitted, and 'the liabilities and equities to which the transferor was subject' were substituted instead.²

Illustration (i) of the section is taken from the English case of *Ex parte Mackenzie*³ and illustration (ii) from *Graham v. Johnson*.⁴

The section as now enacted closely corresponds with sec. 233 of the Code of Civil Procedure which contains a similar provision in regard to decrees:—"Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder."

952. Principle.—By assignment the assignee naturally acquires all the rights of the assignor,⁵ but he is also declared to be subject to all the liabilities and equities to which the assignor was subject at the time of transfer. The scope of the section has, since its amendment, been considerably enlarged. Formerly the transferee was only subject to the *liabilities* of the transferor at the date of the transfer, and in this respect did not afford to the debtor the same protection which was afforded by the terms of the corresponding English Statute,⁶ under which the debtor is entitled to set up all the equities against the assignee which he could have set up against the original creditor. This rule is now enacted by the amendment, and the English cases must therefore be regarded as so far authoritative. Generally stated the rule implies no more than that the assigner cannot convey to the assignee any better title than he himself possesses in the property. A debtor

¹ Report of the Select Committee (Appendix).

² See Proceedings of the Legislative Council, dated February 8rd, 1900 (Appendix).

³ L. R., 7 Eq., 240. The language is directly borrowed from Pollock's Principles of Contracts, p. 211.

⁴ L. R., 8 Eq., 36.

⁵ "Assignatus utitur jure auctoris." (An assignee is clothed with the rights of his principle.)

⁶ Supreme Court of Judicature Act, 1873 [26 & 27 Vic., Ch. 66, sec. 25 (6).]

cannot be damnified by the transfer of his liability made by the creditor in favour of another. It is a rule founded upon good sense and reason that the assignee of a chose in action must take subject to the equities between the original parties. He cannot take only the rights and leave out of account the liabilities. The latter cannot be dissevered from the former. But the rule is by no means inflexible, for if the debtor has foregone or renounced the rule, which may be done by a separate or simultaneous engagement or may be inferred from his conduct or the surrounding circumstances of the case,—in one word estoppel.¹ (§ 955.) The equities must however be existing or arising out of circumstances existing before the assignment is complete. The assignee is not bound by any subsequently created equities.²

953. Meaning of words.—“*Liabilities and equities* :” e.g., with regard to defences, priorities, &c.

954. Liabilities and equities.—No notice of the liabilities and equities is necessary to make the transferee liable under the rule. By the very assignment he becomes liable, and is bound to the debtor in the same way as if he were the original creditor. It is no answer to the debtor's plea that the assignee was not a party to the fraud, or that he took the assignment in good faith and in ignorance of the original equities. Such equities are an incident of the property and pass with it on transfer. The assignee is bound by all the terms and conditions to which the debt assigned may have been subject.³ Thus where a builder assigned to *T* £200 of what should be coming to him under a building contract with *A*, and the contract provided that the building should be finished by a certain day, and if not, that *A* might employ another builder to complete it. The time for completion had expired when the assignment was made, and soon afterwards the builder executed a creditor's deed, the trustee of which completed the building with his own money and was repaid by *A*. Thus allowing this repayment as proper, nothing remained due on the contract. *T* then sued to enforce payment of the £200, but it was held that he could recover nothing. “The thing therefore which was assigned to the plaintiffs was not any absolute property of Hampton, but that which was coming to him under the building contract, and was, therefore, subject to the conditions of that contract, among which was the right of Hallet and Abbey in case of Hampton's default to employ other builders to complete the building.”⁴ The debtor is entitled to set off any counter claim against the assignee which he could have done against the assignor.⁵ Thus if the debtor was entitled to claim damages for the breach of any contract, he is

¹ *In re Natal Investment Co.*, 3 Ch., 365 (361); *Mangles v. Dixon*, 3 H. L. C., 702.

² *Brice v. Bannister*, 3 Q. B. D., 569 (563). In England no transfer is deemed complete before notice.

³ *Subbaraya v. Srinivasa*, 10 M. L. J. R., 211. [The assignee is bound by an order of

a Court previously passed relating to the subject-matter of his assignment.]

⁴ *Tooth v. Hallett*, 4 Ch., 243 (245); distinguished in *Drew v. Joscelyne*, 15 Q. B. D., 580.

⁵ *Kaim Ali v. Luckhy Kant*, 10 W. R., 32, F. B.; *Kristo Kamini v. Kedari Nath*, I. L. R., 16 Cal., 619; and the cases cited, *post*.

equally entitled to claim it against the assignee, but not to the extent of making him further liable than for the dismissal of his claim. In a case the statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded by way of set-off and counter claim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor, it was held, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor. The form of the defence originally made was accordingly ordered to be amended.¹ Similarly where the vendor of immoveable property assigns away the unpaid purchase-money, the buyer is not deprived of his right to retain out of it the amount of any incumbrance upon it.² So where a debenture is issued in fraud of a public company to the assignor who transfers it to the assignee who has no notice of the fraud, the company was held entitled to refuse to pay it on that ground, although the holder had come by it honestly.³ But if in such a case the company have paid the dividend and there is evidence of waiver on their part, then the company cannot set up fraud afterwards. This appears to be now well settled although the *Athenæum Life Assurance Society v. Pooley*⁴ was so far wrongly decided inasmuch as in it the fact of waiver inferable from the company having registered the transfer and paid dividends thereon to the assignee was entirely overlooked.⁵ If a debtor execute a bond in favour of the assignor under circumstances which entitle the former to cancel it, but before its cancellation the assignment is made, the debtor is not precluded from setting up the same equity against the *bond-fide* assignee for valuable consideration although he had no notice of it. Thus where in a case one Graham, a Captain in the Indian Army, gave to Johnson, a barrister, without consideration a bond for £1,000, at the same time giving him at his request a letter to the effect that the bond was given for the purpose of enabling Johnson to raise money. Three years afterwards, the latter sold the bond to one Barlow at the same

¹ *Young v. Kitchen*, 3 Ex. D., 127. (Order XIX, Rule 3, as to cross claims is the same as sec. 110 of the Code of Civil Procedure, in fact, the latter is copied from the former, *Kaim Ali v. Lucky Kant*, 10 W. R., 83 F. B.; *Kristo Kamini v. Kedar Nath*, I. L. R., 16 Cal., 619.

² *Lacey v. Ingle*, 2 Ph., 418.

³ *Athenæum Life Assurance Society v. Pooley*, 3 DeG. & J., 294.

⁴ 1 Giff, 102; 3 DeG. & J., 294.

⁵ *Ex-parte Chorley*, 11 Eq., 157; *Ex parte*

Colborne v. Straudbridge, 1b., 478; *Ex parte City Bank*, 3 Ch., 788; *Webb v. Herne Bay Commissioners*, L. R., 5 Q. B., 642 (in which upon similar facts the company was set-off from setting up the equity which they might have otherwise set up); *Higgs v. Northern Assam Tea Co.*, 4 Ex., 287; *In re Northern Assam Tea Co.*, 10 Eq., 458; *Woodhams v. Anglo-Australian, &c., Co.*, 2 D.J. & S., 162; *Ex parte Colborne and Straudbridge*, 11 Eq., 478; *In re Hercules Insurance Co.*, 19 Eq., 802; *Goodwin v. Roberts*, 1 App. Cas., 476.

time also making over the letter to him. Barlow then demanded payment from Graham which the latter promised as soon as he should come into some property on the faith of which Barlow abstained from suing him. In the meantime, however, Graham instituted his suit both against Johnson and Barlow for its cancellation. It was held that, although Graham gave the bond with the intention that it should be used as a negotiable instrument, yet as there was nothing on the face of the bond to shew such intention, Barlow took it subject to the equities between Graham and Johnson, and therefore Barlow could not be allowed to enforce it against Graham. And with regard to the latter's promise to pay, it was held that having been made in ignorance of his right to restrain Barlow from suing him on the bond, the assignor was not precluded from enforcing that right.¹ Lord Romilly, M. R., in delivering judgment in the case observed: "Now in all cases in which forbearance to sue has been held to be a sufficient consideration to support a promise to pay, the person forbearing to sue has had a right to sue. I have not now to consider what would have been the effect if Barlow had been induced to deliver up the bond to the plaintiff by the plaintiff's promise to settle it; but the question I have to consider is, whether, assuming, as I must assume, that the plaintiff when he made the promise was ignorant that the Court of Chancery would restrain an action on the bond without requiring him to pay off what had been paid by Barlow to the obligee, his promise made in consideration of Barlow's forbearance to sue is binding on him. I think it is not."²

The same rule has been applied to mortgage transactions in which an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor.³ The right of a tenant in Malabar to compensation is analogous to the right to a chose-in-action; and a transfer of such a right by a tenant to a third party cannot affect the landlord unless the latter has notice of the transfer when he accepts the surrender of the property demised and settles the account with his tenant in reference to arrears of rent and the amount due as compensation.⁴ A suit brought by an assignee for recovery of arrears of rent assigned after they fell due, has been held to be a suit for rent, and therefore not within the cognizance of the Court of Small Causes.⁵

955. Estoppel: Waiver.—It has been stated before that the doctrine must be regarded as subject to a contract to the

¹ *Graham v. Johnson*, 8 Eq., 86.

² *Ib.*, p. 44.

³ *Chinnayya v. Chidambaram*, 1 L. R., 2 Mad., 212; *Bickerton v. Walker*, 81 Ch. D., 161 (159); *Rice v. Rice*, 2 Drew., 78; *Vasudeva v. Damodaran*, 1 L. R., 23 Mad., 86.

⁴ *Vasudeva v. Damodaran*, 1 L. R., 23 Mad., 86.

⁵ *Siris Chandra v. Nasim Quasi*, 4 C. W. N., 357, F. B.; *SheikA Munsar v. Loke Nath*, 1 C. W. N., 10, followed.

contrary.¹ It would also be affected by waiver or estoppel. If a person before taking an assignment of a bond actually inquires from the obligor whether it is a good bond and the money secured by it is due, and is told that the bond is good and the money is due, the obligor can never set up against the assignee that the bond was obtained by fraud.² It would thus appear that it is always safe for an assignee to make inquiries of the debtor, but the latter is by no means bound to answer such inquiries or to disclose the defences open to him. But if he answers at all, he must answer truly at his own peril. He cannot put the assignee off his guard by cunning insinuations or equivocations if not by direct false replies, and he cannot even be allowed to stand by and see the assignee deceived and entrapped, when he could have apprized him of his risk.³ So, again, if a debtor has acknowledged the receipt of a sum of money in a bond on the faith of which the assignee has acted, he is afterwards estopped from denying the receipt of consideration.

Thus in one case Lord Hatherley, L. C., observed : " I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money, he cannot affect not to know what he was doing, and it is not enough for him afterwards to say that he thought it was only a form. That merely amounts to saying that a misrepresentation was made to him, under which he executed a deed ; still the deed may have been exactly what he intended to execute, though he intended it to be used for a totally different purpose. But this does not affect the deed. The fraud of the person who used the deed for a different purpose does not make it less the deed of the person who executed it."⁴

Again, where the debtor has by the original contract held out to the assignees a promise to pay, he cannot afterwards recall the promise. Thus in a case where a bank gave to D. T. & Co. a letter addressed to them, and expressed thus : " You are hereby authorized to draw upon this bank to the extent of £15,000, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from its date, and parties negotiating bills under it are requested to indorse particulars on the back thereof." It was held that whatever might be the effect of the letter of credit at law, it constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled in equity, without regard to the equities between the bank and D. T. & Co. ; and that the assignee was therefore entitled to prove for the amount due on the bills without regard to the state of the account between the bank and D. T. & Co. " The whole effect of the letter is," said Sir G. J. Turner, L. J., " that the Agra Bank held out to the persons negotiating the bills a promise that it would pay the bills ; and it would be impossible, according

¹ § 586, ante.

² *In re Hercules Insurance Co.*, 19 Eq., 302 (310).

³ *Goodwin v. Roberts*, 1 App. Cas., 476 (490) ; *Pickard v. Sears*, 6 Ad. & E., 469 (474).

⁴ *Hunter v. Walters*, 7 Ch., 75 (82).

to my view of the doctrines of Courts of Equity, to allow the bank after having sent that letter into the world addressed to the persons who were to negotiate the bills, and so held out to them that it would be answerable for their payment, to say that because there was a debt due to it from the persons to whom it had given the letter of credit, therefore it would not pay the bills. Apart, therefore, from any question as to how the case may stand at law, I think that there clearly is a perfectly good equity to sustain a bill filed by any one of the persons by whom bills drawn under the letter of credit had been negotiated, to compel the Agra Bank to accept and pay these bills which were taken and paid for upon the faith of the statement which was made in the letter."¹ To this Cairns, L. J., added: "If it be necessary to determine the question of the legal liability of the Agra Bank, I am of opinion that, upon the offer in this letter being accepted and acted on by the Asiatic Banking Corporation (the assignee), there was constituted a valid and binding contract against the Agra Bank, in favour of the Asiatic Banking Corporation. The cases as to the offer of rewards . . . appear to me to be sufficient authority to shew that there may be privity of contract in such a case; and if the view be adopted which appears to have been taken in the American Courts that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road."²

956. Negotiable instruments excepted.—The provisions of this section do not apply to negotiable instruments, as to which the rule is that any person taking it in good faith obtains a title to it independently of the title of the person from whom he took it.³ But such an instrument must be assigned by indorsement and delivery, or by any other customary mode of transfer, and if it is assigned in any other way the assignment then would, it appears, be subject to the liabilities and equities of the original parties.⁴ "The plaintiff," observed Lord Cairns in a case, "bought in the market scrip which, from the form in which it is prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that any one who became *bond fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign government. . . . The scrip itself would be a representation to any one taking it—a representation which the appellant must be taken to have made, or to have been a party to—that if the scrip were taken in good faith, and for value, the person

¹ *In re Agra and Masterman's Bank*, 2 Ch., 391 (395).

² *In re Agra and Masterman's Bank*, 2 Ch., 391 (396); see as to analogous cases *Williams v. Carwardine*, 4 B. and Ad., 631; *Denton v. G. N. Railway Co.*, 5 E. and B., 860; *Barlow v. Harrison*, 1 E. and E., 295 (800); *Scott v. Pilkington*, 3 B. and S., 11.

³ Negotiable Instruments Act (Act XXVI

of 1881), ss. 78, 83; *Aga Ahmed v. Orisp*, 1 L. R., 19 Cal., 242, P. C.; *Goodwin v. Roberts*, 1 App. Cas., 476.

⁴ *Pattal v. Krishnan*, 1 L. R., 11 Mad., 290; *Marimuttan v. Krishnasami*, 1 L. R., 17 Mad., 197; *Abhay Chetti v. Ramachandra*, 1 L. R., 17 Mad., 461; *Simon v. Mahomed*, 1 L. R., 19 Mad., 363; *Gurumurti v. Sivayya*, 1 L. R., 21 Mad., 391.

taking it would stand to all intents and purposes in the place of the previous holder."¹

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

957. Analogous law.—This was sec. 134 before the amendment. Its provisions may be compared with secs. 109—119 of the Indian Contract Act,² and sec. 109 of which runs thus: "If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract."

958. Principle.—This section lays down a rule of construction by which any covenants made by the assignor as to the solvency of the debtor will be construed.

While there can be no doubt that in an assignment there is a warranty on the part of the assignor that the obligation transferred was subsisting, the warranty as regards the solvency of the debtor or the payment of the debt is not necessarily implied. Where the assignor, however, gives such a warranty, he becomes the surety for the debtor and can be proceeded against as such. Again, unless the warranty given is continuing, the presumption of law would be that the warranty was confined to the debtor's solvency only at the time of the transaction, and to the extent in amount of the consideration of the transfer.

959. Meaning of words.—"Transferor of a debt:" "Debt" here has been used as an equivalent to an "actionable claim," "And is limited," i.e., unless the parties agree otherwise. "Amount or value:" "Amount" refers to consideration in money and "value" to consideration in any other shape.

960. Warranty.—The seller of an actionable claim, like the seller of any other property is bound to assure the purchaser of his title in the thing sold, as well as that he has a right to sell it.³ There is the further covenant that he shall do nothing in derogation of his deed.⁴ In addition to these covenants presumed

¹ *Goodwin v. Roberts*, 1 App. Cas., 476 (489); *In re Easton and London, &c., Bank*, 34 Ch. D., 98 (118).

² Act IX of 1872.

³ Sec. 109, Indian Contract Act (Act IX of 1872).

⁴ *Aulton v. Atkins*, 25 L. J. (C. P.) 220; *Gerard v. Lewis*, 2 C. P., 205.

by law, the assignor may enter into further covenants with the assignee, but these must be the subject of an explicit contract and are not implied. Where the contract is unequivocally explicit it must be given effect to, and the section will then be inapplicable. But should it fail to mention the time and the amount for which the warranty is given, the section provides a simple rule of construction, according to which the contracts of the parties must be construed.

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery : secondly, in or towards satisfaction of the amount for the time being secured by the transfer ; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged-debt.

961. Analogous law.—This section has been slightly improved by the amendment, by the addition of the words “or other person entitled to receive the same.” The other two changes are merely verbal ; these being the substitution of the initial word “where” for “when,” and “if received by the transferor or recovered by the transferee” for “if recovered by either the transferor or transferee.” There could not be of course *recovery* of the debt by the transferor after its assignment by him. These amendments were made by the Select Committee. In the Bill the section was allowed to pass unaltered with the remark that “it is of doubtful accuracy, but does not seem to have given rise to any difficulty.”¹ The procedure for the attachment of debt is laid down in sec. 268 of the Code of Civil Procedure.

The section may be generally compared with sec. 97, and sec. 176 of the Contract Act which lays down a similar rule applicable to moveable property.

962. Principle.—This case presupposes the mortgage of an obligation. Thus if *A* owes *B* Rs. 100, who is indebted in the like sum to *C*, to whom he transfers his debt due from *A* as a security, *C* and *B* are entitled to deduct out of the payment, if any, made to them on account of the debt (1) the costs incurred in realizing it ; (2) in paying *C* for the amount due to him from *B* and for which the debt was made a security ; (3) the residue, if any, being then paid to *B*. The change in the language introduced in the section would appear to shew that the transferor is not entitled to *recover* the debt after its assignment, but at the same

¹ Statements of Objects and Reasons (Appendix).

time he is not precluded from receiving any payment made in lieu thereof by the debtor. The transferee of the debt is, on the other hand, entitled to recover it legally from the debtor, and if he is prudent enough to give notice of his assignment it is scarcely likely that there will be any occasion for the transferor to even receive the debt. A transfer by way of mortgage imports an assignment, and would therefore be also subject to the rule.¹

963. Meaning of words.—“*Existing or future debt*,” i.e., debt paid or payable. The mortgage may have been made to secure a loan actually made or it may be made against future advances. “*If received by the transferor*.” The word “*received*” denotes passivity, and is not declaratory of a right. “*For the time being secured by the transfer*,” and not any unsecured advances. The payment to be made is of the amount due and secured, but not if it is due but is unsecured. “*Transferor or other person*,” such as executors, attaching creditors, &c.

964. Mortgaged-debt.—This section treats of a case where a debt is the subject-matter of a mortgage. Such transfer must be made by an assignment, whether it be by way of mortgage or an out and out sale. If A mortgage certain property to B, and B sub-mortgages it to C, but without an assignment, C cannot sue and will have no cause of action against A. Of course, in such a case he might proceed against B and attach the same property in execution of his decree, if the debt then subsists, but in this case he can only obtain a money-decree, and his suit would not be for the enforcement of his mortgage.² Such an order would be directed to the garnishee to pay up the amount to the attaching decree-holder. But if the garnishee denies the debt, there is then no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under sec. 503 of the Code of Civil Procedure.³ The rights of the mortgagee to recover the debt, therefore accrue upon and commence from the date of assignment. He takes with the debt the securities for it which cannot be dis severed from it,⁴ as also all the accessories such as interest dividends or profits accruing due from that date. He cannot, however, without a special contract recover anything that may have already accrued due before the assignment. In all other respects the position of the assignee of a mortgagee is exactly the same as that of the mortgagee himself, although the mortgagor may not have been a party to the assignment.⁵ But the latter is not to suffer by the assignment, and if therefore, the mortgagee of certain property holds also certain promissory notes as a collateral security he

¹ *Ganga Prasad v. Chunni Lal*, I. L. R., 19 All., 112.

² *Ganga Prasad v. Chunni Lal*, I. L. R., 19 All., 112; *Ganpat v. Sarup*, I. L. R., 1 All., 446; *Toolea Goolal v. John Antone*, I. L. R., 11 Bom., 448.

³ *Toolea Goolal v. John Antone*, I. L. R., 11 Bom., 448.

⁴ *Walker v. Jones*, L. R., 1, P. C., 50; *Subramaniam v. Perumal*, I. L. R., 18 Mad., 454.

⁵ *Walker v. Jones*, L. R., 1, P. C., 50 (61).

cannot assign one without the other to a third person, and if he does so, he cannot be allowed to recover on the notes, pending a suit instituted by him to redeem and settle the equities of the parties.¹ But the case would be different if the note is indorsed to another who takes it *bond fide* for valuable consideration and without notice. In such a case the indorsee would be entitled to recover even though it may have been already paid. "It is quite true that, as between the defendant, (i.e., maker of the note) and the payee of the note, after the transfer of the mortgage, in equity the right of the payee to sue on the note for his own benefit ceased, because he had parted with all his interest and could only hold the note as trustee for the mortgagor or for the transferee as the case might be, and the payee could therefore be restrained by injunction from suing on the note, unless he were entitled to sue as trustee for the transferee of the mortgagee, which would depend upon the agreement between the parties. That would be the equitable right of the defendant as against the payee. But, when the note gets into the hands of a *bond fide* indorsee for value without notice of the facts, there can be no such equity as against him."²

In the absence of a contract to the contrary the assignee of a mortgagee is bound to use prudent care in recovering the debt. If he is guilty of wilful default or negligence in consequence of which the debt has become irrecoverable, he would be liable to the mortgagee for the loss thus occasioned.

135. Every assignee, by endorsement or other

**Assignment of rights
under marine or fire
policy of insurance.**

writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

965. Analogous law.—This section is entirely new to the Act: otherwise it reproduces the only unrepealed section of the Policies of Insurance (Marine and Fire) Assignment Act, 1866,³ which is therefore now wholly repealed.⁴ The original section provided for the transfer of the marine and fire policies "by indorsement or otherwise" for which in the section the words "by endorsement or other writing" have been substituted.

¹ *Walker v. Jones*, L. R., 1, P. C., 50 (61), p. 68.

² *Per Lindley, J.*, in *Glasscock v. Balls*, 24 Q. B. D., 18 (16, 17).

³ Act V of 1866.

⁴ Sec. 5, Act II of 1900. See the Schedule.

The section is in accordance with the English Statute, Policies of Marine Assurance Act, 1868,¹ which runs thus :—

“Whereas it is expedient that the assignees of Marine Policies of Insurance should be enabled to sue thereon in their own names :

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :—

1. Whatever a policy of insurance on any ship, or any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property therein insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected.

Assignee of Marine Policies may sue thereon in their own name.

2. It shall be lawful to make any assignment of a policy of insurance by indorsement on the policy in the words or to the effect set forth in the Schedule hereto.²

Assignment by indorsement.

3. For the purpose and in the construction of this Act the term “Policy of insurance” or “Policy” shall mean any instrument by which the payment of money is assured or secured on the happening of any of the contingencies named or contemplated in the instrument of assurance known as “Lloyd's Policy,” or in any other form adopted for insuring ships' freights, and goods carried by sea.

Interpretation of terms.

Short title.

4. This Act may be cited for all purposes as the “Policies of Marine Assurance Act, 1868.”

The law as to Life Insurance is, however, quite different, and in no way an exception to the rule laid down in sec. 130.³

Similar provision relating to bills of lading has been made by sec. 1 of Act IX of 1856.

966. Principle.—This section has been incorporated into this chapter, inasmuch as its provisions constitute an exception to the rule laid down in sec. 130.⁴ By the law merchant such policies were always transferable by indorsement, and the assignee is entitled without notice to the debtor to all the rights of the transferee, who is entitled to sue on the contract in the same manner as if it had been originally made with himself. A policy of fire or marine insurance is a contract of indemnity, and on the principle of subrogation, the assignee is entitled to be placed in the position of the assignor in the same way as the company issuing the policy is upon payment of the amount of loss entitled to be subrogated to the rights of the assured.⁵ As the one can enforce all rights

¹ 31 & 32 Vic., Ch., 86.

² Printed under Conveyancing Precedents, *post*.

³ The English Law is similar. See Policies of Assurance Act, 1867, 30 & 31 Vic.,

Ch., 144, sec. 3.

⁴ Statement of Objects and Reasons.

⁵ *Dane v. Mortgage Insurance Corporation*, L. R. (1894), 2 Q. B., 54.

against the Insurance Company so is the other entitled to recover from the assured any sum which he may have received by way of compensation from other sources in excess of the loss actually sustained by him.¹ Such a policy may be assigned after the loss so as to entitle the assignee to sue upon it in his own name, provided that at the time of assignment the assignor's interest had not ceased.² In an action by the assignee the insurers cannot plead set-off of a debt incurred with them by the assured for premiums on policies effected with them by the assured after the assignment, for the claim under the policy for a loss is for unliquidated damages to which no set-off could be pleaded.⁴

967. Meaning of words.—“*Endorsement or other writing:*” In the unrepealed section of Act V of 1866 the corresponding words were “by endorsement or otherwise” which probably meant “by endorsement or other like means,” i.e., “by endorsement or other writing.”⁵ “*Shall have transferred and vested to him, &c.,*” shall be subrogated to the rights of the assured.⁶

136. No Judge, legal practitioner, or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

Incapacity of officers connected with Courts of Justice.

968. Analogous law.—There have been some alterations in this section which corresponds to sec. 136 of the unamended Act. The section was originally worded thus:—“No Judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his function.” In substituting the words “legal practitioner,” for the words “pleader, mukhtar” the change is justified on the ground that the provision ought clearly to apply to all legal practitioners alike.⁷ The Select Committee

¹ *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, 5 Ch. D., 560; *Darrell v. Tibbitts*, 5 Q. B. D., 560; *Castellain v. Preston*, 8 Q. B. D., 618; 11 Q. B. D., 880; *Dejowret v. Bishop*, 18 Q. B. D., 878.

² *Lloyd v. Fleming*; *Lloyd v. Spence*, 7 Q. B., 290.

³ *North of England Pure Oil Cuke Co. v. Archangel Maritime Insurance Co.*, 10 Q. B., 40.

Pallas v. Neptune Marine Insurance Co.

4 C. P. D., 120; 5 C. P. D., 34; *Mildred v. Maspons*, 8 App. Cas., 874.

⁵ Statement of Objects and Reasons (Appendix).

⁶ *Dejowret v. Bishop*, 18 Q. B. D., 878 (878).

⁷ Statement of Objects and Reasons (Appendix). The section has been apparently borrowed from Art. 1567 of the Code Napoleon which runs as follows:—“Judges, their deputies, the Commissaries of Government, their substitutes, registrars, tipstaves

further amended the draft section and observed thus upon it: "In sec. 140 (now 137)¹ we think the general word 'officer' is sufficient, without specifying clerks and bailiffs. We have altered the language of the section so as to cover the case of a practitioner who stipulates for an interest in the subject-matter of a suit. It seems to us expedient that, the judges, officers and legal practitioners of our Courts should be precluded from dealing in actionable claims generally, and not merely in those claims which fall within the jurisdiction of the Courts to which they respectively belong at the time of such dealing; and we have altered the section in accordance with this view."² As revised by the Select Committee this section was numbered 137, and sec. 137 stood as sec. 136. But in the Council the two sections were transposed on the motion of the Law Member, which was seconded by the Hon. Mr. Woodroffe, who said: "The question has arisen in this way: it has been suggested that regard being had to the language of the present sec. 137, no legal practitioner could take a cheque in payment of his fees, a result which would, of course, be a serious matter for any member of the profession to which I have the honour to belong, and that by placing sec. 136 after 137, which exempts from the application of this Act negotiable instruments, such as a cheque, the difficulty would be overcome."³ This motion was agreed to, and the two sections were accordingly transposed and renumbered.

The provisions of this section are similar to those of sec. 292 of the Code of Civil Procedure, which lays down an analogous rule: "No officer having any duty to perform in connection with any sale under this chapter shall either directly or indirectly bid for, acquire or attempt to acquire any interest in any property sold at such sale." The prohibition in the Code is, however, only confined to officers of Court, whereas under this section it is extended to several other persons whose duty brings them in contact with Courts.

969. Principle.—The reason upon which the rule is founded appears to be sound for such persons as are restrained from dealing in actionable claims are those whose duties require them to abstain from speculating in claims in regard to which they may be called upon to perform their duties which they will not be able to perform with disinterested efficiency if they were allowed to have a direct or indirect interest in the result. Then, again, an actionable claim is an intangible right and not susceptible of easy valuation, and if, therefore, judges and lawyers are allowed to bid for them there is great danger of unfairness, and in cases the property is even apt to be undersold.

pastors of churches, official conductors of defences and notaries, cannot become assignees of suits, claims, and actions at law which are within the jurisdiction of the Court within whose cognizance they exercise their functions, on pain of nullity,

and expenses and damages."

¹ Now sec. 136; see *post*.

² Report § 12 (Appendix).

³ Proceedings of the Governor-General's Legislative Council, Feb. 2, 1900 (Appendix).

Public policy therefore dictates that in dealing with such claims officers connected with Courts of Justice should not be placed in a position in which they may be tempted to use the influence or information which they may acquire by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims.¹ Thus it was observed in one case by the Privy Council:—"It is of great importance in all countries, and more particularly in a country like India, that no officer of a Court of Justice should be even exposed to the suspicion, that in the discharge of his official duties his conduct may be influenced by any personal consideration; and although we see no reason to think that the proceedings in the present case have been at all affected, either in their origin, or their conduct hitherto, by such considerations, yet when there is room for the operation of sinister motives, the belief of their operation can hardly be excluded from the minds of the parties."² And so in another case decided as far back as 1870, the purchase by the pleader of the decree of his client was animadverted upon, and it was said: "It is not expedient that pleaders engaged in suits should thus become the persons entitled to execute the decrees."³ "The general rule of equity is that a man cannot place himself in a situation in which his interest conflicts with his duty. The cases show that that principle is acted upon whenever a person occupying the position of solicitor to a mortgagee acquires a benefit however honest the transaction may be in itself, on the ground that it is often very difficult, if not impossible, to find out how the advantage was gained."⁴

The change made by the section has, it should be noted, considerably affected the position of the legal practitioners and officers of Courts dealing with property. They can now freely acquire debts secured by mortgage or hypothecation, but may not purchase any other debts, such as outstandings of a zemindari or any other legitimate business concerns, with which they are customarily disposed of. And since the prohibition is absolute, it follows that legal practitioners and the officers of Courts cannot invest in such outstandings however remote and unconnected with their place of business, even though they may freely speculate in mortgage-suits and indeed all secured debts.

§70. Meaning of words.—"Judge." A judge is defined in the Code of Civil Procedure to be the presiding officer of a Court.⁵

¹ *Rathnasami v. Subramanya*, I. L. R., 11 Mad., 66 (61).

² *Per* Right Hon. T. Pemberton Leigh in *Kerakoes v. Serle and others*, 3 M. I. A., 329 (846).

³ *Goshain v. Chingunlal*, 2 N.-W. P. H. C. R., 46 (47). To the same effect in *Nun-*

deput v. Uryuhart, 18 W. R., 209; *Aghore Nath v. Ram Churn*, I. L. R., 23 Cal., 805.

⁴ *Subbarayudu v. Kottayya*, I. L. R., 15 Mad., 389 (597); *Greenlaw v. King*, 3 Beav., 49; *Martison v. Clowes*, L. R., 21 Ch. D. 857; *Guest v. Smythe*, L. R., 6 Ch., 551.

⁵ Sec. 2, Act XIV of 1882.

And in the Indian Penal Code the term has been given a more extended import :

19. "The word 'Judge' denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not, appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

- (a) A Collector exercising jurisdiction in a suit under Act X of 1859 is a Judge.
- (b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence, to fine or imprisonment, with or without appeal, is a Judge.
- (c) A member of a *punchayet* which has power, under Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.
- (d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge."

It is apprehended that the term "Judge" has been used here in its generic and wider sense so as to include all such persons whose duty it is to determine questions or adjudicate upon the claims of parties.

"*Legal Practitioner*" : means an advocate, vakil, or attorney of any High Court, a pleader, mukhtar, or revenue-agent.² The term should be held to comprehend also solicitors as well as "*am-mukhtars*" retained to conduct cases.³ "*Or officer connected with any Court of Justice*:" such as Accountants, Clerks of Courts, Readers, Bailiffs such as a Nazir or Naib-Nazir, Commissioners, Court Amins, translators, peons and all *attachés* of Courts. All officers irrespective of their duties are not intended, but only such as are connected with any Court of Justice. "*A Court of Justice*:" denotes a Judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body when such Judge or body of Judges is acting judicially."⁴

"*Or at the instance of any person, &c.,*" such as an assignee *benamidar* or the like.

971. Change in law.—Under the section as it originally stood the prohibition was not so unqualified as it is now made. It was then sufficient if the officers did not buy only such claims as

¹ Sec. 19, Indian Penal Code (Act XLV of 1860) see also for a similar definition of the term in sec. 3 of the Legal Practitioners' Act (Act XVIII of 1879). ("A Judge means the presiding Judicial Officer in every Civil and Criminal Court by whatever title he is designated.")

² Sec. 3, Legal Practitioners' Act (Act XVIII of 1879).

³ Sec. 2, Code of Civil Procedure (Act XIV of 1882).

⁴ Sec. 20, Indian Penal Code (Act XLV of 1860).

fell under the jurisdiction of the Court in which they exercised their functions. It was therefore held that a pleader who did not habitually practise in the Court by which the actionable claim was not cognizable was not precluded from purchasing it. If, therefore, the pleader had been practising in a Court superior to that by which an action on the claim would be cognizable the prohibition was not extended to him. But under the section as now enacted the prohibition is absolute and irrespective of the jurisdiction of the Court and of the functions exercised by its officers, and the cases, therefore, decided upon the construction of the old section must be regarded as so far now definitely overruled.¹

972. Reason for change.—As stated before, under the section as it originally stood the prohibition extended only to claims falling within the jurisdiction of the Courts in which they habitually exercised their functions, but having regard to the fact that there are constant changes of Judges as well as officers, and that legal practitioners from all parts of the country may, from time to time, plead and appear in any Court, the prohibition has been made absolute as regards them all.²

973. Limits of incapacity.—The section, as it originally, stood, was somewhat vague and indefinite. Not only did it not provide for the consequence which the violation of the rule was to entail, but by making the prohibition to extend to all actionable claims, it did not exclude even actionable claims such as debentures and shares of companies to which, it cannot be conceived that the prohibition was intended to be extended. By the amendment of the chapter these points have now been made clear. A legal practitioner or other officer of Court dealing in any actionable claims other than those excepted by the following section, is not entitled to sue upon them. In other words, such transactions are in the eye of the law absolutely void. "Every contract," said Holt, C. J., "made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract."³ But that does not mean that the Court can be moved to cancel or set aside such transactions on the motion of any party aggrieved, who being presumably affected with constructive notice of the transaction being in fraud of the policy of law is equally without a remedy. *In pari delicto potior est conditio defendentis.*⁴ But should in such a case the unlawful nature of the contract be not apparent on its face, and the defendant be more to blame than the plaintiff, then the Court, will rescind the transaction on his motion.⁵ Such

¹ These cases are *Appasami v. Scott*, I. L. R., 9 Mad., 5 (9); *Rathasami v. Subramanya*, I. L. R., 11 Mad., 56; *Singarachari v. Sivabai*, ib., 498; *Subbarayudu v. Kotayya*, I. L. R., 15 Mad., 389.

² Proceedings of the G.-G.'s Legislative Council (Appendix).

³ *Bartlett v. Vinor Carthew*, 252; cited by Norman J., in *Kamala Kant v. Kalu Mahmmed*, 3 B. L. R. (A. C.), 44 (45).

⁴ *Gossami v. Robb*, I. L. R., 8 Bom., 206 (404).

⁵ Sec. 35 (b), Specific Relief Act (Act I of 1877).

cases would arise where the sale has taken place through the intervention of a third person, such as a *benamidar*, or that the party aggrieved resided at a distance so as to be ignorant of it, or had no means to inquire about its reality, or that he has acted under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition or age so that his guilt may be far less in degree than that of his associate in the offence.¹ Thus where in execution of a decree against the plaintiffs a certain valuable property was put up for auction, and purchased by the plaintiffs' pleader with his own money, but in the name of his mohurri, and for a very inadequate sum, and there was evidence to shew that the mohurri had dissuaded other bidders, the sale was set aside, and the purchaser was directed to reconvey the property to the plaintiffs on repayment of the purchase-money with 15 per cent. upon that amount as compensation within a certain time fixed.² This case was however, decided on the ground of fraud which the facts of the case had disclosed.

974. But apart from that question, there is nothing in law

Decrees of Courts.

against a pleader's purchasing the property of his client sold in Court, although no doubt the Courts will always look askance at such transactions³ and throw the onus on him to prove that the transaction was free from suspicion.⁴ The Civil Procedure Code does not prohibit such purchases, which can only be impeached on the general grounds of fraud, unfairness or undue influence. Nor again, is the pleader precluded from purchasing decrees of Courts which are not choses in action. No doubt officers having any duty to perform in connection with the sale are forbidden from purchasing the property sold at such sale,⁵ but a pleader is not an officer within the meaning of sec. 292 of the Code of Civil Procedure.⁶ The combined effect of sec. 292 of the Code and sec. 136 of the Transfer of Property Act, then is to forbid officers of Court from dealing in both actionable claims as well as other property which may be sold in Court, but the prohibition as regards legal practitioners must be held to be confined to only actionable claims. There are no doubt cases⁷ before cited which deprecate pleaders acquiring decrees and bidding at Court sales in respect of properties in which they were professionally concerned, but these cases were decided before the two enactments, and must be therefore now regarded as no longer authoritative.⁸

¹ Story's Equity Jurisprudence, § 800
Reynell v. Sprye, 1 D. M. & G., 660 (668).

² *Aghore Nath v. Ram Churn*, I. L. R.,
28 Cal., 805 (817); *Subbarayudu v. Kottaya*,
I. L. R., 15 Mad., 389.

³ *Subbarayudu v. Kottaya*, I. L. R., 15
Mad., 389 (398).

⁴ *Subbarayudu v. Kottaya*, I. L. R., 15
Mad., 389 (398); following *Greenlaw v.*
King, 3 Beav., 40.

⁵ Sec. 292 of the Code of Civil Procedure
(Act XIV of 1882).

⁶ *Alugirisami v. Ramanathan*, I. L. R.,
10 Mad., 111.

⁷ These cases are *Goshain v. Chinguntal*,
2 N. W. P. H. C. R., 46; *Nundesput v.*
Urquhart, 13 W. R., 209; *Syed Wajed Hossain*,
v. Haft Ahmed, 17 W. R., 480 (488).

⁸ *Alugirisami v. Ramanathan*, I. L. R.,
10 Mad., 111 (112).

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Saving of negotiable instruments, etc.

Explanation.—The expression “mercantile document of title to goods” includes a bill of lading, dock-warrant, warehouse-keeper’s certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

975. Analogous law.—This section corresponds with sec. 139 of the unamended Act which ran thus: “Nothing in this Chapter applies to negotiable instruments.” Now a “negotiable instrument” only means a promissory note, a bill of exchange, or a cheque,¹ but does not include the ever-increasing class of negotiable instruments which the usage of the money market recognizes as such.² So again a saving was required for mercantile documents of title to goods, such as bills of lading, etc., which form a class of quasi-negotiable instruments. All these are now exempted from the operation of the Chapter.

The explanation appended to the section is taken from sec. 1 (4) the English Factors Act, 1889,³ in which the term “mercantile documents of title to goods” is thus defined:—

“The expression ‘document of title’ shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of the goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.”

The Select Committee substituted for the words “and delivery order” “railway receipt, warrant or order for the delivery of goods,” and added “debentures” after the words “stocks and shares” in the section.⁴

¹ Sec. 18, Negotiable Instruments Act (Act XXVI of 1881).

² Statement of Object and Reasons Appendix; Chalmers on Bills of Exchange, 5th Ed., 312—327.

³ 52 & 53 Vic., Ch., 45; this definition is adopted also in the Sale of Goods Act, 1906 56 & 57 Vic., Ch., 71, sec. 62 (1).

⁴ Report of the Select Committee (Appendix).

976. Principle.—The law respecting negotiable instruments more depends upon custom and the general rules of the law merchant and cannot be made the subject-matter of any enactment. Such rules may be truly declared to be in a great measure, not the law of a single country, but of the whole commercial world.¹ In England an attempt has been made to codify these rules in the Bills of Exchange Act, 1882,² and in this country the law relating to the chief negotiable instruments is embodied in the Negotiable Instruments Act, 1881,³ but which, however, leaves untouched negotiable bonds or scrips, bills of lading, or dock-warrants,⁴ the law relating to which is still mainly regulated by custom. All such documents are therefore exempted from the operation of the Act.

977. Meaning of words.—“*By law or custom, negotiable:*” “When a promissory note, bill of exchange, or cheque, is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.”⁵ Ordinarily negotiation is complete by delivery,⁶ or where the instrument is payable to the order of a specified person, or to a specified person or order then both by indorsement and delivery.⁷

978. Quasi-negotiable instruments.—Besides the instruments ordinarily classed and treated as negotiable there are those which verge upon it and have been held to fall within the definition of negotiable instruments. In construing such an instrument regard must be had to the intention of the maker. If it is intended that it should circulate from hand to hand it is negotiable although it may differ in form. Thus an instrument in these terms “on the deposit of title-deed I promise to pay you or order Rs. 160 for value received,” the words “or order” were held to indicate that the instrument was intended to circulate from hand to hand, and the fact that there was “deposit of title-deeds” did not negative that intention inasmuch as all that the words implied was that a collateral security was also given which could not in any way restrain the operation of the promissory note as a negotiable instrument.⁸ The words “to order” or “to bearer” are important as without them a promissory note would not be negotiable.⁹ A bare statement of account followed by a promise to pay is not a promissory note,¹⁰ which to be negotiable must be unconditionally payable to, or to the order of, a certain person, or to the bearer of the instrument.¹¹

¹ *Swift v. Tyson*, 16 Peters, 1; *Luke v. Lyde*, 2 Burr., 887.

² 45 & 46 Vic., Ch., 61.

³ Act XXVI of 1881.

⁴ *Whitley Stokes' Anglo-Indian Codes*, Intro. to XXVI of 1881.

⁵ Sec. 14, Negotiable Instruments Act, Act XXVI of 1881.

⁶ *Ib.*, sec. 47.

⁷ *Ib.*, sec. 48.

⁸ *Ramchandra v. Sesha*, I. L. R., 17 Mad., 85; *Wise v. Charlton*, 4 Ad. and E., 790.

⁹ *Kanhaiyalal v. Domingo*, I. L. R., 1 All., 782; sec. 4, Negotiable Instrument Act (Act XXVI of 1881).

¹⁰ *Tirupathi v. Rama*, I. L. R., 21 Mad., 49.

¹¹ Sec. 4, Negotiable Instruments Act (Act XXVI of 1881).

THE SCHEDULE.

[See Section 2.]

(a).—STATUTES.

Year and Chapter.	Subject.	Extent of Repeal.
27 Hen. VIII, c. 10	Uses ...	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances	The whole.
4 Wm. and Mary, c. 16.	Clandestine mortgages	The whole.

(b).—ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of Repeal.
IX of 1842 ...	Lease and Release ...	The whole.
XXXI of 1854 ...	Modes of conveying land	Section 17.
XI of 1855 ...	Meane profits and improvements.	Section 1 ; in the title, the words "to meane profits and," and in the preamble "to limit the liability for meane profits and." ¹
V of 1866 ...	Policies of Insurance (Marine and Fire) Assignment.	The whole.
XXVII of 1866 ...	Indian Trusts Act ...	Section 31.
IV of 1872 ...	Punjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876 ...	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief ...	In sections 35 and 36, the words "in writing."
XIV of 1897 ...	Indian Short Titles.	So much as relates to Policies of Insurance (Marine and Fire) Assignment Act (Act V of 1866). ²

(c).—REGULATIONS.

Number and year.	Subject.	Extent of Repeal.
Bengal Regulation I of 1798.	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts : interest : mortgages in possession.	Section 15.

¹ Sec. 5, Act II of 1900.² *Ib.*

SUPPLEMENTARY CHAPTER ON CONVEYANCING.

INTRODUCTION.

979. It has been seen in the foregoing pages that no important transfer can be consummated without a conveyance. Conveyancing is then that branch of the law of the Transfer of Property which deals with the mode and form in which the expression of the intention to transfer a property must be embodied before it shall take effect. The transferor may have passed the property intending to pass it, but if he has not expressed himself in suitable language, and the deed is defective or is susceptible of two or more constructions, the fruit of the transfer may be lost to the transferee, and where adverse claimants have in the meantime interposed, it may be that the transferor with all his willingness may be wholly unable to help him. In this country the art of conveyancing is, except perhaps in the Presidency towns, altogether unknown. In the mofussil the deeds of transfer, irrespective of their importance and value are usually drawn up by petition-writers, merchants' clerks, village pedagogues and town mountebanks, who usually adhere to stereotyped phraseology often oblivious of the covenants and conditions entered into by the parties. Such haphazard method of transferring property is only adapted to the simplest forms of transfer and derives its security more from the absence of adverse claimants, the sanctity of a written though unseen document than from the perfection of the transfer or of its unassailable character. In England conveyancers form a special class of men who make the drafting of deeds their chief business, and indeed important deeds are invariably drawn up by Solicitors, and Counsel's aid is not infrequently requisitioned in cases of difficulty.

980. Formerly in England, deeds used to assume inordinate lengths, and their language with its conventional phraseology and tiresome repetition was often as unintelligible to the layman as the language of thieves. The length of deeds has been, however, recently much curtailed, and in the ensuing pages only such forms of the English Conveyancing have been adopted as appeared to be well adapted to the requirements of this country.

981. A deed is technically called an "indenture" from the old practice of writing the duplicates of all deeds *inter partes* on one skin, which was then cut in half irregularly or with a jagged edge, so that when the duplicates were produced in court they could be seen to belong to one another by fitting into one another. This

practice had long since fallen into disuse even before the passing of the Amendment of the Law of Real Property Act 1845,¹ by which it is provided that a deed purporting to be an indenture shall have the effect of an indenture though not actually indented.

Such deeds were formerly called *deeds-poll*, from their being *polled* or shaved quite even.

982. No particular words are necessary to validate a deed.

Words necessary.

And therefore a deed may be written in any language and worded in any way provided that its sense is clear, and that it is expressed in an unambiguous language. It often happens that parties to a contract take many things for granted at the time of entering into the transaction, but nothing could be more fatal to the security afforded by a conveyance than to take things for granted and turn out imperfect documents. Now as it is enacted in the Evidence Act that in such a case secondary evidence is inadmissible, it follows that what was assumed cannot be proved, and that an imperfect instrument thus frustrates its very purpose and often breeds within itself germs of ruinous litigation. In drawing up a deed, therefore, it is always essential to embody therein *all* the terms of the contract. The transferor must state who and what he is, and similar description must be also given of the transferee. The particular mode of transfer must then be fully set out mentioning at the same time the amount of consideration, paid or payable, and for which the transfer is effected. The purpose for which it is made need not, however, be mentioned except where the transfer is partial, and the transferee is to be bound down by restrictive covenants. In the case of a transferor who is entitled to alienate the property only under certain circumstances, in their nature variable, as for example a Hindu widow, the necessity or justifiable circumstances must be invariably inserted. It is, again, most important that the property transferred must be described explicitly, and in detail. Any rights reserved and any covenants imposed must be also mentioned specifically. In describing a property it is not advisable to define it in relation to destructible landmarks, for these may be destroyed, and then the property may not be capable of an exact delimitation. There can be nothing better than describing property by measurement. It is also usual to annex a map of the place, prepared by a surveyor. But a rough sketch is not only useless but misleading. Lastly, after it is ready the deed must be read out to the executant in the presence of persons who are to be subsequently called upon to attest it.

983. Reading of the deed is always necessary, whenever any

Execution: Attestation.

of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited;

¹ 8 & 9 Vic., Ch., 106, sec. 5.

unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.¹

984. There is no proper attestation if the witnesses have not seen the execution of the document but have only relied upon the admission of the executant.² The executant must affix his signature in their presence. Its execution is then complete. A deed should be engrossed upon a proper stamp, for it is provided that a deficiently stamped document shall not be admitted in evidence for any purpose by any person having by law or consent of parties, authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer,³ unless the deficiency has been made good and a penalty prescribed by the law has been levied thereon. Where an instrument may be stamped with adhesive labels, it will have of course to be written upon a plain paper, but then the adhesive stamps affixed thereto must be so cancelled so that they may not be used against.⁴ But save such instruments, where an instrument has to be written upon paper with an impressed stamp, it must be written in such manner that the stamp may appear on the face of the instrument, and cannot be used or applied to any other instrument.⁵ It is not necessary that the whole or any part of the instrument should be engrossed upon the stamped paper or upon the side impressed with the stamp.⁶ But all instruments chargeable with duty, and executed by any person in British India, should be stamped before or at the time of execution,⁷ and those executed out of British India must be stamped within three months after they have been received within the limits of British territory.⁸ Where in the case of any sale, mortgage, or settlement, several instruments are employed for completing the transaction, the principal instrument only is chargeable with the highest prescribed *ad valorem* duty, each of the other instruments being chargeable with a duty of one rupee only. The question for determining as to which one of the several instruments is deemed to be the principal instrument is one which is entirely left to the discretion of the parties.⁹ Where an instrument is so framed as to come within two or more descriptions of instruments chargeable with different duties, the highest of such duties must be paid.¹⁰ And where an instrument comprises or relates to several distinct matters it is chargeable with the aggregate amount of the duties with which separate instruments each comprising or relating to one of such matters, would have been chargeable.¹¹ But no more than one

¹ Blackstone's Commentaries, II, 304.

² *Girindra Nath v. Bejoy Gopal*, I. L. R., 26 Cal., 246; *Abdul Karim v. Salimun*, I. L. R., 27 Cal., 190.

³ Sec. 36, Indian Stamp Act (Act II of 1899).

⁴ Secs. 11, 12, *ib.*

⁵ Sec. 13, *ib.*; *Dowlat Ram v. Fitko*, I. L. R., 5 Bom., 188.

⁶ *Dowlat Ram v. Fitko*, I. L. R., 5 Bom., 188.

⁷ Sec. 17, Indian Stamp Act (Act II of 1899)

⁸ Sec. 18, *ib.*

⁹ Sec. 4, *ib.*

¹⁰ Sec. 6,

¹¹ Sec. 5, *ib.*

instrument should be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written.¹ But assignments and transfers made by endorsement are excepted from this rule, provided that they are duly stamped unless they be exempted from duty.² The consideration, if any, and all other facts and circumstances affecting the chargeability of any instrument with duty or its amount should be fully and truly set forth therein.³ For the purpose of calculating duty upon an instrument it is to be calculated upon its consideration, average price or its value on the date of the instrument.⁴ Where any property is transferred to any person in consideration, wholly or in part, of any debt due to him or subject, either certainly or contingently, to the payment or transfer of any money or stock whether being or constituting a charge or incumbrance upon the property or not, such debt, money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad-valorem* duty. In the case of a sale of property subject to a mortgage or other incumbrance, any unpaid mortgage-money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sales; provided that, where property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.⁵

985. Another requisite of a deed of transfer in most cases is its registration. In England there is no universal system of public registry, but on the Continent the system is substantially the same as in this country. If a deed is not compulsorily registrable it is complete without registration, and its registration then if made has only the result of insuring to it priority in certain cases, besides perhaps investing it with additional sanctity. But if it is compulsorily registrable, it must be presented for registration before an officer competent to register assurances.⁶ It is important to see that the officer is duly qualified to register documents for a document registered by an incompetent officer may be of no effect. More particularly is it essential to see that the document is not presented in a wrong registration circle, for a document so registered is not registered according to law since its registration has not been effected by an officer competent to exercise jurisdiction in that locality. In order that a "document may be presentable for registration" it is necessary that any interlineations, blank, erasure, or alteration should be signed or initialled by the executant, for in any other case the registering officer has the option of refusing its registration.⁷ And it is further provided that "no

¹ Sec. 14, *ib.*

² *ib.*

³ Sec. 27, *ib.*

⁴ Secs. 31, 24, *ib.*

⁵ Sec. 34, *ib.*

⁶ Blackstone's Commentaries, II, 304.

⁷ Sec. 20, Act III of 1877.

non-testamentary document relating to immoveable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same. Houses in towns shall be described as situate on the north or other side of the street or road (mentioning it) to which they front, and by their existing and former occupancies, and by their numbers, if the houses in such street or road are numbered—other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate, and by their superficial contents, the roads and other properties on which they abut and their existing occupancies, and also, whenever it is practicable, by reference to a Government map or survey."¹ But documents containing the description of the property sufficient to identify it are excepted from the above rule.² An instrument containing a map or plan of any property comprised therein should be accompanied by a true copy of the map or plan; or, in case such property is situate in several districts, by such number of true copies of the map and plan as are equal to the number of such districts.³ Ordinarily a document must be presented for registration within four months from the date of its execution, provided that, where there are several persons executing a document at different times, such document may be presented for re-registration and registration within four months from the date of each execution.⁴ But should a document be not presented within this time, owing to urgent necessity or unavoidable accident, another four months are allowed by way of grace, but then the document can then be registered only on payment of a fine up to the limit of ten times the amount of the proper registration fee.⁵ Documents executed outside British India are allowed four months from the date of their arrival in British India.⁶ A document for registration must be presented by some person executing or claiming under the same, or, by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorized by power-of-attorney executed and authenticated⁷ as provided in sec. 33 of the Indian Registration Act.

986. After its registration the document should be delivered

Delivery.

to the party in whose favour the transfer is thereby effected. In cases where delivery of possession is essential to complete transfer, delivery of the instrument is often regarded as tantamount to the delivery of formal possession, and in such cases the instrument should be invariably made over to the transferee.

After its registration the document becomes a muniment of title, and it should usually remain in the possession of the person to whom the property has been thereby conveyed. Possession by

¹ Sec. 21, *ib.*

² Sec. 22, *ib.*

³ *ib.*

⁴ Sec. 23, *ib.*

⁵ Sec. 24, *ib.*

⁶ Sec. 25, *ib.*

⁷ Sec. 32, *ib.*

a person of a document of title often creates a presumption in his favour. Thus, for example, possession of a mortgage-deed by the mortgagor creates a presumption that the security has been discharged.

In spite of all precautions, it often happens that an instrument is after all in some detail imperfect or ambiguous, in which case it may become necessary to construe it, with the aid of canons which equity and reason have dictated. These rules are always of great moment in untangling the skein of ambiguous or defective deeds, and will be found set out in the foregoing pages.

CONVEYANCING PRECEDENTS.

I.—SALES.¹

987. CONTRACTS OF SALE.

AN AGREEMENT made the——day of——, 19——, between *A B* of, &c. [*vendor*], of the one part, and *C D* of, &c. [*purchaser*], of the other part. THE SAID *A B* will sell, and the said *C D* will purchase, the fee simple in possession free from incumbrances of ALL THAT, &c., for the sum of Rs. ——, whereof Rs. —— shall be paid immediately on the execution of these presents, and the residue on the ——day of——next, at the office of the *Registrar*, when the purchase shall be completed. THE VENDOR shall, within——days from the date hereof, deliver to the purchaser [*or to his solicitor*] an abstract of his title to the premises. UPON PAYMENT of the said sum of Rs. —— at the office aforesaid, the vendor and all other necessary parties (if any) will execute a proper assurance of the premises to the purchaser, such assurance to be prepared by and at the expense of the purchaser, and to be left by him at the office aforesaid not less than——days before said——day of——.

THE POSSESSION will be retained by the vendor down to the said——day of——, and as from that day all outgoing shall be discharged and the possession taken by the purchaser, and such outgoing shall, if necessary, be apportioned between the vendor and the purchaser. IF FROM any cause whatever the purchase shall not be completed on the said——day of——, the purchaser shall pay interest at the rate Rs. —— per cent. per annum on the unpaid purchase-money from that day until the completion of the purchase. No ERROR, mis-statement, or omission in the description of the property shall annul the sale, BUT COMPENSATION shall be allowed or given as the case may require and shall be settled by two arbitrators before they enter upon the reference, and the decision of such arbitrators, or their umpire, if they disagree, shall be final. IN WITNESS, &c.

988. ANOTHER FORM.

ARTICLES OF AGREEMENT made the——day of——19——, BETWEEN *A B* of, &c. [hereinafter called the "*Vendor*"], of the one part; and *C D* of, &c. [hereinafter called the "*purchaser*"]

¹ Or "MEMORANDUM OF AGREEMENT."

of the other part. IT IS HEREBY AGREED between the parties hereto as follows :—

I. THE VENDOR shall sell, and the purchaser shall purchase, the hereditaments described in the schedule hereto with their appurtenances and the inheritance thereof in fee simple in possession free from incumbrances, at the price of Rs. —, [to be paid as follows, that is to say, the sum of Rs. —, as a deposit immediately after the signing of this agreement, and the residue thereof on the completion of the purchase].

II. The purchase shall be completed on the — day of — [at the office of — the vendor's pleader or solicitor, &c.],¹ and the purchaser shall then have possession of the premises, all outgoings up to that time being cleared by the vendor. If from any cause whatever the purchase shall not be completed on the — day of — next, the purchaser shall pay to the vendor interest on [the residue of] the purchase-money after the rate of Rs. — per cent. per annum (or mensem as the case may be) from that day until the completion of the purchase.

III. The vendor shall, on or before the — day of —, deliver to the purchaser [or his solicitor, &c.] an abstract of title to the said premises, such abstract to commence with indentures of lease and release dated —, and the purchaser shall not require the production of, or investigate, or make any objection, or requisition in respect of the prior title whether referred to in any abstracted document do not.²

IV. ALL recitals and statements in any deed or other document dated twenty years and upwards prior to the date of this agreement, shall be accepted by the purchaser as conclusive evidence of the facts and matters recited or stated therein, or to be assumed or implied therefrom.

V. The production and inspection of all deeds or other documents not in possession of the vendor, and the procuring and making of all certificates, attested, official, or other copies of, or extracts from, any records, registers, deeds, wills, or other documents, and of all declarations and other evidence whatsoever, which may be required by the purchaser for the purpose of verifying the abstract, or for any other purpose, shall be at the expense of the purchaser who shall also bear the expense of all searches, inquiries, and journeys which may be required for the above purpose, or any of them.

VI. All objections and requisitions in respect of the title or the abstract, or anything appearing therein or in this agreement, shall be stated in writing, and sent to the office of the said Mr. — [vendor's pleader, or solicitor] within — days from the

¹ Or "upon the vendor executing and registering a deed of sale."

² After this article should be added any special condition which the state of the title may require.

delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived.

VII. UPON payment of the purchase-money at the times and in manner aforesaid the vendor shall make and execute to the purchaser a proper assurance of the premises, such assurance to be prepared by and at the expense of the purchaser, and to be left by him not less than seven days before the said day of at the office aforesaid for execution by the vendor.

VIII. SUCH of the muniments of title as relate to other property of the vendor, as well as to the premises, hereby agreed to be sold, shall be retained by him, and he shall enter into the usual covenant with the purchaser for production and furnishing copies of the same, the deed containing such covenant to be prepared by and at the expense of the purchaser.

IX. THE PREMISES are believed to be correctly described in the schedule hereto, but if any error or misstatement shall be found in the said schedule, the same shall not annul the sale, but compensation to be ascertained by two indifferent persons and in case of their disagreement by their umpire, and if either party shall fail to appoint a referee for the space of ten days after notice shall have been given to him by the other party so to do, the referee appointed by the other party may make a final decision alone.

IN WITNESS, &c.

989. ANOTHER FORM.

I, *A B*, son of *C D*, owner of the premises known as *X* and situate in , having agreed to sell for the sum of Rs. , the same to *P Q* do hereby agree, covenant and bind myself, my heirs, executors, &c., in manner following, that is to say—

1. That I shall execute a duly registered assurance in respect of the said property known as *X*, and hereinafter more particularly described, on or before the day of 19 , and that the whole amount of the purchase-money shall be paid to me in presence of the registrar.

2. That if I fail to carry out in any respect the covenant set forth in the foregoing article, I shall pay, and the said *P Q* shall be entitled to recover from me the sum of Rs. as compensation for the non-fulfilment of my contract.

3. That in the meantime I promise and agree to facilitate in every way the investigation of my title in the said premises by *P Q* and I covenant with the said *P Q* that in case the said *P Q* discovers any reasonable flaw in my title as the absolute owner of the said premises, he shall be entitled to repudiate the sale and to recover from me the sum of Rs. by way of compensation in the same way as if I had failed to perform my part of the contract.

4. That the premises I have agreed to sell are bounded on the north by &c., and measure feet from N. to S. and from E. to W.

[Here add any additional clauses necessary.]

990.

MEMORANDUM OF AGREEMENT made the day of , BETWEEN *A B* of, &c. (*vendor*), of the one part, and *C D* of, &c. (*purchaser*), of the other part:—

1. THE said *A B* (hereinafter called the vendor) agrees to sell, and the said *C D* (hereinafter called the purchaser) agrees to purchase the hereditaments described in the schedule hereto, and the inheritance thereof in fee simple in possession, at the price of Rs. , to be paid as follows, that is to say, the sum of Rs. , as a deposit immediately after the signing of this agreement, and the residue thereof on the completion of the purchase.¹

[Then continue as in the forms above printed.]

991. AGREEMENT FOR THE SALE OF LEASEHOLD PROPERTY.

MEMORANDUM OF AGREEMENT made the day of , BETWEEN *A B* of, &c. (*vendor*), of the one part, and *C D* of, &c. (*purchaser*), of the other part:—

1. THE said *A B* (hereinafter called the vendor) agrees to sell, and the said *C D* (hereinafter called the purchaser) agrees to purchase all that messuage or dwelling-house being No. , in street, held by lease, dated the day of , for the unexpired residue of a term of years computed from the day of , subject to the yearly rent of Rs. , and to the covenants and conditions contained in the lease and on the lessee's part to be observed and performed at the price of Rs. to be paid, &c.

2. The purchase shall be completed on the day of at the office of Mr. (the vendor's pleader or solicitor), and the purchaser shall then have possession of the said premises, all outgoings up to that time being cleared by the vendor. If the purchase shall not be completed on the day of next, the purchaser shall pay to the vendor interest on the purchase-money after the rate of—per cent. per annum from that day until the completion of the purchase.

¹ Where the money is agreed to be deposited with a stakeholder, say, "of which Rs. shall be paid to *P Q* of, &c., as a stakeholder, by way of deposit, immediately after the signing of this agreement, and the remainder shall be paid on the completion of the purchase."

992. CONVEYANCE ON SALE.

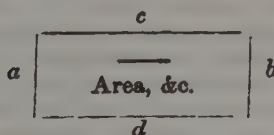
THIS INDENTURE made by way of conveyance, this day of 19, BETWEEN *A B* [*vendor*] of, &c., of the one part; and *C D* [*purchaser*] of, &c., of the other part:¹

Witnesseth that in consideration of the sum of Rs. paid by the said *C D* to the said *A B* for the purchase of the lands hereinafter mentioned² in fee simple in possession free from incumbrances, the receipt of which sum the vendor hereby acknowledges, the said vendor as beneficial owner hereby conveys unto the purchaser ALL THAT piece of land containing by admeasurement acres roods or thereabouts, situated in the village of in the district of and bounded on or towards the north by land now or late of on or towards the south by , on or towards the west by , &c., AND ALSO all that other piece of land containing, &c., situate, &c., and bounded, &c., together with the messuage or tenement and outbuildings erected or standing on the said last-mentioned piece of land, all which said premises were lately in the tenure or occupation of [or ALL THAT, &c., situate, &c., more particularly described in the schedule hereto, and intended to be delineated (or shown) on the plan indorsed on these presents].

To HOLD³ [the same] to, and to the use of the said *C D* in fee simple absolutely.⁴

IN WITNESS whereof the said parties have hereto set their hands and seals the day and year first above written.

THE SCHEDULE above referred to.



¹ Or say "whereas the said *A B* being the beneficial owner, in fee simple, free from all [charges and] incumbrances, of and in the land hereditaments hereinafter described, has contracted with the said *C D* for the absolute sale to him thereof, at the sum of Rs.

NOW THIS INDENTURE WITNESSETH, &c."

² Or "Specified in the Schedule hereunder written."

³ Or "To have and hold."

⁴ Here insert if necessary:—

"AND THE SAID *A B* doth hereby, for himself, his heirs, executors, and administrators, covenant with the said *C D*, his executors, administrators, and assigns, that he, the said *A B*, has full power and the sole and absolute right to sell and assign the said premises in manner aforesaid; AND that the said *C D* shall hereafter peaceably hold, use, and enjoy the same as his own chattels and

993. ANOTHER FORM.

THIS INDENTURE made the day of , BETWEEN *A B* of, &c. (*vender*), of the one part, and *C D* of, &c. (*purchaser*), of the other part:

Whereas the said *A B* is seised of the hereditaments herein-after granted for an estate of inheritance in fee simple in possession free from incumbrances, and he has agreed to sell the same to the said *C D* for the sum of Rs.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of Rs. , this day paid by the said *C D* to the said *A B* the receipt whereof the said *A B* doth hereby acknowledge, he, the said *A B* AS BENEFICIAL OWNER, doth hereby grant unto the said *C D*, his heirs and assigns, ALL THOSE and hereditaments situate in the village of in the district of , delineated on the plan in the margin of these presents and specified in the schedule hereto, TO HOLD the premises UNTO and TO THE USE of the said *C D*, his heirs and assigns. IN WITNESS, &c.

THE SCHEDULE above referred to.

994. IN A CONVEYANCE EXECUTED BY SEVERAL VENDORS, CO-PARCENERS AND THE LIKE, THE PRECEDENT SHOULD BEGIN THUS:—

THIS INDENTURE, made, &c., BETWEEN *A B* of, , and *C D* of [*vendor*], of the one part; and *E F* of [*purchaser*], of the other part. WHEREAS *P Q* late of died on the intestate, leaving his surviving sons, the said *A B* and the said *C D*.

AND WHEREAS the said *A B* and *C D* are seised of the hereditaments hereinafter granted in fee simple in possession as co-proprietors (co-parceners, tenants-in-common, joint-tenants, &c., as the case may be) in equal shares, and they have agreed to sell the same free from incumbrances to the said *E F* for the sum of Rs. . NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of Rs. this day paid to the said *A B* and *C D* by the said *E F*, the receipt whereof the said *A B* and *C D* hereby acknowledge, they, the said *A B* and *C D* according to their several and respective shares, EACH AS BENEFICIAL

property without any hindrance, interruption, claim, or demand, by or from him, the said *A B*, or any other person whomsoever.

“AND ALSO that he, the said *A B*, his executors and administrators, will do all such further acts and things as may be necessary and required for further assuring the title or the peaceable possession of the said chattels as aforesaid, unto and by the said *C D*, executors, administrators, and assigns; and for indemnifying him and them against all losses, damages, expenses, claims, and liability whatsoever, if any, which he or they may pay, sustain, incur, or be put to by reason or in respect of the purchase thereof.”

OWNER of one equal undivided moiety,¹ DO, and each of them DOTH hereby grant unto the said *E F*, his heirs and assigns ALL THOSE, &c., TO HOLD the premises UNTO and TO THE USE of the said *E F*, his heirs and assigns.

IN WITNESS, &c.

995. ON A SALE, THE MORTGAGEE JOINING.

THIS INDENTURE made the day of 19
BETWEEN *A* of [&c.] of the first part, *B* of [&c.] and *C* of [&c.] of the second part and *M* of [&c.] of the third part: WHEREAS by an indenture dated [&c.] and made between [&c.] the lands hereinafter mentioned were conveyed by *A* to *B* and *C* in fee simple by way of mortgage for securing Rs. and interest and by a supplemental indenture dated [&c.] and made between the same parties those lands were charged by *A* with the payment to *B* and *C* of the further sum of Rs. and interest thereon: AND WHEREAS a principal sum of Rs. remains due under the two before-mentioned indentures but all interest thereon has been paid as *B* and *C* hereby acknowledge Now THIS INDENTURE WITNESSETH, that in consideration of the sum of Rs. paid by the direction of *A* to *B* and *C* and of the sum of Rs. paid to *A* those two sums making together the total sum of Rs. paid by *M* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of Rs. *B* and *C* hereby acknowledge the receipt and of which total sum of Rs. *A* hereby acknowledges the payment and receipt in manner beforementioned *B* and *C* as mortgagees and by the direction of *A* as beneficial owner hereby convey and *A* as beneficial owner hereby conveys and confirms to *M* all that [&c.] to hold and to the use of *M* in fee simple discharged from all money secured by and from all claims under the beforementioned indentures. [And if required,] and *A* hereby acknowledges the right of *M* to production of the documents of title mentioned in the schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof.

IN WITNESS, &c.

THE SCHEDULE above referred to.²

III. THE title shall commence with the said lease (which has been produced by the purchaser), and the production of the receipt for the last payment of rent which shall have become due thereunder shall be deemed conclusive evidence that all the covenants

¹ Or where the shares are unequal or undefined say:—"As and according to and as beneficial owners of the estates, shares, and interests to which they respectively claim to be entitled as hereinbefore is mentioned, and as to all other (if any) the estates, shares and interest which they respectively are entitled to or can dispose of."

² To contain the list of documents retained by the vendor.

and conditions therein have been observed and performed up to the day of completion, or that all breaches thereof (if any) have been waived.

IV. The description of the property in the schedule hereto is believed and shall be deemed to be correct, and no objection shall be made or compensation claimed on account of an error of description as to quantity or otherwise if any such should be found.

V. All objections and requisitions in respect of title or the abstract shall be stated in writing, and sent to the office of the said Mr. (the vendor's pleader or solicitor) within days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and for the purpose of any objection or requisition the abstract shall be deemed perfect, if it supplies the information suggesting the same, though otherwise defective; and if the purchaser shall insist on any objection or requisition in respect of the title, which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty (notwithstanding any intermediate negotiation in respect thereof, or any attempt to remove or comply with the same), by notice in writing, to rescind this agreement, and the purchaser shall forthwith return to the vendor the abstract of title, and any other papers in his possession belonging to the vendor, and he shall have no claim on the vendor for costs or otherwise.

VI. On payment of the purchase-money at the time and in manner aforesaid the vendor shall make and execute a proper assignment of the said premises to the purchaser, such assignment to be prepared by and at the expense of the purchaser, and to be effected by him not less than seven days before the said day of , at the office aforesaid, for execution by the vendor.

IN WITNESS, &c.

THE SCHEDULE above referred to.

996. SALE BY A VENDOR WITH LIMITED POWER OF DISPOSITION.

THIS INDENTURE, made the day of 19 , BETWEEN *A B* (hereinafter called the vendor) of, &c., of the first part, *C D* of, &c., and *E F* of, &c. (*reversioners of the deceased owner*), of the second part, and *G H* of, &c. (*purchaser*) of the third part : WHEREAS *P Q*, husband of the vendor, died intestate on or about the day of 19 , leaving the said vendor as his sole surviving widow in possession of his self-acquired property hereinafter described, AND WHEREAS the said *P Q* had left the said property mortgaged to by an Indenture dated for the sum of Rs. ,¹ and which sum is still due, and the said

¹ Or "the said *P Q* has on his death-bed enjoined upon the said *A B* the necessity of visiting the holy places [or performing his *shradh* at Gya with appropriate ceremonies," &c.]

vendor has no other means of discharging, AND WHEREAS the said vendor as the sole surviving heir, with the concurrence of the said *C D* and *E F*, the reversionary heirs of the said *P Q* has for the propose aforesaid agreed with the said *G H* to sell to him the said hereditaments and the fee-simple thereof free from incumbrances at the price of Rs. : NOW THIS INDENTURE WITNESSETH, &c.

997. CONVEYANCE OF LAND FOR BUILDING IN CONSIDERATION OF A PERPETUAL RENT-CHARGE. COVENANTS BY GRANTER TO BUILD THEREON AND TO INSURE AND KEEP IN REPAIR BUILDINGS AND OTHER COVENANTS IN CONNECTION WITH BUILDINGS.

ANOTHER FORM.

THIS INDENTURE, made the day of 19 , BETWEEN *A B* of, &c. (*vendor*), of the one part, and *C D* of, &c. (*purchaser*), of the other part: WITNESSETH that in consideration of the rent hereinafter limited, and of the covenants of the said *C D* hereinafter contained, the said *A B*, as beneficial owner, hereby conveys unto the said *C D* ALL THAT piece of land situate, &c., and containing, &c., being part of an estate of the said *A B* known as the estate, which has been laid out for building purposes, and which piece of land intended to be hereby conveyed is delineated in the plan drawn in the margin of these presents and is therein coloured pink, the remainder of the estate being also shown on the said plan and therein coloured yellow: TOGETHER with the messuage or dwelling-house now in course of erection on the said piece of land: TO HOLD the same unto the said *C D*, in fee-simple, TO THE USE that the said *A B* shall have, in fee-simple, a perpetual yearly rent-charge of Rs. , issuing out of the said hereditaments and premises, and payable by two equal half-yearly payments on the day of and the day of in every year, the first half-yearly payment thereof to be made on the day of next, AND SUBJECT to the said rent-charge, and to the statutory powers and remedies for recovering and compelling payment thereof, TO THE USE of the said *C D* in fee-simple: and the said *C D* hereby covenants with the said *A B* and assigns in manner following (that is to say), THAT the said *C D*, his heirs or assigns, will at all times hereafter pay the said yearly rent charge at the times hereinbefore appointed for payment thereof; AND also will within twelve calendar months next after the date of these presents, at his or their expense, under the inspection and to the satisfaction of the architect for the time being of the said *A B*, his heirs or assigns, complete so as to be fit for habitation, the messuage or dwelling-house now in course of erection upon the said piece of land, the said messuage or dwelling-house to be, when completed; of the value of Rs. at least, and also will, at the request of the said *A B*, his heirs or assigns, produce to him or them full and satisfactory vouchers of expenditure to the value aforesaid: AND ALSO will at all times hereafter keep the said messuage or dwelling-

house, and all boundary walls and drains belonging thereto, in good and tenantable repair and condition, and will permit the said *A B*, his heirs or assigns, and all persons authorised by him or them, once in every year in the daytime, on giving to the tenant or occupier, for the time being of the said messuage one week's notice in writing of his or their intention so to do, to enter into and upon the said messuage and proceed to examine the condition thereof: AND ALSO will at all times insure and keep insured against loss or damage by fire the said messuage or dwelling-house in the office, or some other public insurance office in the sum of Rs. at least, and will on demand produce to the said *A B*, his heirs or assigns, the policy or policies of insurance, and the receipt for the premium payable in respect thereof for the current year, and will whenever any loss or damage by fire shall happen to the said messuage or dwelling-house or any part thereof forthwith expend the money received under such insurance as aforesaid, and also such other moneys as may be necessary for the purpose, in rebuilding or reinstating the same: AND ALSO that the said *C D*, his heirs or assigns, will not alter or permit to be altered the external plan or elevation of the said messuage or dwelling-house without the previous consent in writing of the said *A B*, his heirs or assigns, nor will without such consent as aforesaid erect upon the said piece of land any other messuage or building than the said messuage or dwelling-house now in course of erection as aforesaid except a stable, or coach-house, or green-houses, or conservatories, in connection therewith: AND ALSO that the said *C D*, his heirs or assigns, will not at any time without such consent as aforesaid carry on, or permit to be carried on upon the said premises, any trade or business whatsoever, or use or permit the same to be used for any other purpose than as a private dwelling-house: [AND IT IS HEREBY DECLARED¹ that the restrictive covenants hereinbefore contained are entered into with the said *A B*, as the owner of the remainder of the said estate of which the land hereby conveyed forms part, for the benefit and protection of that estate.]

PROVIDED ALWAYS, and it is hereby declared, that if the said yearly rent of Rs. , or any part thereof, shall be in arrear and unpaid for the space of twelve calendar months next after either of the said half-yearly days of payment hereinbefore appointed for payment thereof, or if there shall be a breach of any of the covenants hereinbefore contained on the part of the said *C D*, his heirs or assigns, then and in any such case, and notwithstanding the waiver of any previous default or breach it shall be lawful for the said *A B* or his heirs, into and upon the said premises hereby conveyed, or any part thereof, in the name of the whole,

¹ The restrictive covenants in the above precedent are intended to prevent the value of the land retained by the grantor from being depreciated by the acts prohibited. They can be enforced by injunction against the grantee, and all persons deriving title under him, as volunteers or as purchasers with notice.

to re-enter, and the same thenceforth to repossess and enjoy as if these presents had not been made.

IN WITNESS, &c.¹

998. ASSIGNMENT OF A POLICY OF LIFE ASSURANCE.

THIS INDENTURE, made the day of 19 , BETWEEN *A B* of, &c. (*vendor*), of the one part, and *C D* of, &c. (*purchaser*) of the other part: WHEREAS by a policy of assurance under the hands of three of the directors of the Assurance Company, dated the day of , and numbered , the sum of Rs. is assured to be paid to the executors, administrators, or assigns of the said *A B*, within three calendar months after his decease, subject to the annual premium of Rs. ; AND WHEREAS the said *A B* has agreed to sell to the said *C D* the said policy of insurance, at the price of Rs. : NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of Rs. , &c., the receipt whereof the said *A B* hereby acknowledges, the said *A B* as beneficial owner, hereby assigns unto the said *C D*, ALL THAT the hereinbefore recited policy of assurance, and the said sum of Rs. thereby assured, and all other moneys, benefits, and advantages to be had, recovered, or obtained under or by virtue of the said policy: TO HOLD the same unto the said *C D* absolutely, subject to the conditions as to payments of the future premiums and otherwise to be henceforth observed in respect of the said policy.

IN WITNESS, &c.

999. ASSIGNMENT OF GROWING CROPS.

THIS INDENTURE, made the day of , BETWEEN *A B* of, &c. (*vendor*), of the one part and *C D* of, &c. (*purchaser*), of the other part: WHEREAS the said *A B* hath agreed to sell to the said *C D* the crops of corn and grass now growing on the pieces of land hereinafter described, and all the benefit and advantage thereof, at the price of Rs. : NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of Rs. —, &c., the receipt whereof the said *A B* hereby acknowledges, the said *A B*, as beneficial owner, hereby grants and assigns unto the said *C D* ALL the corps of corn and grass which are now growing, arising, and being on the several pieces or parcels of land hereinafter described, namely (*here describe the lands specifically*): TOGETHER WITH FULL LIBERTY for the said *C D*, and the servants, labourers, and other persons employed by him for that purpose, either with or without horses, carts, and carriages, from time to time, and at any time or times during the ensuing months of and , between the hours of in the morning and in the evening of each day, of the said months respectively (*excepting the Sundays*

¹ Pridgeaux's Precedents in Conveyancing (14th Ed.), Vol. I, p. 353.

which shall occur therein),¹ to enter upon the said pieces or parcels of land respectively, or any part or parts thereof respectively, for the purpose of seeing the condition of the said crops, and for the purpose of reaping, mowing, and cutting the said crops of corn and grass respectively, and removing the same respectively, and also to do all such other acts and things as may be necessary or required for the purpose of obtaining the full benefit of these presents: To HOLD the same unto and to the use of the said C D absolutely.

IN WITNESS, &c.

1000. PARCELS WITH GENERAL WORDS.

1. All that piece or parcel of meadow or pasture land commonly called or known by the name of , situate in the district of , containing by admeasurement , or thereabouts, and bounded on the north by land of , and on all other sides by land of , which piece or parcel of land is in the occupation of , as yearly tenant thereof, and is delineated and coloured pink in the map or plan drawn in the margin of these presents: TOGETHER with all buildings, commons, fences, hedges, ditches, ways, waters, water-courses, liberties, privileges, easements, and appurtenances whatsoever to the said piece or parcel of land belonging to or in anywise appertaining or usually held or occupied therewith or reputed to belong or be appurtenant thereto. AND ALL THE ESTATE right, title, interest, claim, and demand whatsoever of the said , in and to the said premises and every part thereof

2. ALL THAT MESSUAGE or dwelling-house with the outbuildings, yard, and garden thereto belonging, commonly called cottage situate in lane, in the village of in the district of , and now in the occupation of , as yearly tenant thereof, which premises contain together by admeasurement or thereabouts, and are delineated and coloured pink in the map or plan or drawn in the margin of or drawn hereunder in these presents, or ["plan hereunto annexed," these presents:] TOGETHER with all buildings, yards, gardens, trees, fences, hedges, ditches, ways, sewers, drains, water-courses, liberties, privileges, easements, and appurtenances whatsoever to the said messuage and premises belonging or in anywise appertaining or usually held or occupied therewith, or reputed to belong or be appurtenant thereto.

3. AND ALL THE ESTATE, &c. [see above].

4. THE HEREDITAMENTS described in the schedule hereto, together with all rights and things appurtenant or reputed to be appurtenant thereto.

5. TOGETHER with all rights, easements, and appurtenances to the said premises hereby demised belonging, or reputed to belong, or usually held, occupied, or enjoyed therewith.

¹ Omit this if necessary.

II.—MORTGAGES.

1001. FORM OF SIMPLE MORTGAGE.

THIS INDENTURE, made¹ the day of , BETWEEN *A B* of, &c., hereinafter called the mortgagor, of the one part, and *C D* of, &c., hereinafter called the mortgagee, of the other part, WITNESSETH that, &c. (continue as in the last form), AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid the said mortgagor as beneficial owner hereby mortgages unto the mortgagee by way of simple mortgage all, &c. (parcels), AND IT IS HEREBY AGREED AND DECLARED that if the said sum of Rs. with interest thereon, shall not be paid on the day —next, according to the foregoing covenant in that behalf, it shall be lawful for the mortgagee, his executors, administrators, or assigns, at any time or times, to sell the said messuage and premises, and with and out of the moneys to arise from any such sale as aforesaid, in the first place pay and retain the costs and expenses attending such sale or otherwise incurred in relation to this security, and in the next place pay and satisfy the moneys which shall then be owing upon this security, and shall then pay the surplus (if any) to the mortgagor, and should the sale not realize the sum due to the mortgagee, the mortgagor hereby covenants with the mortgagee, THAT HE, the mortgagor, will pay to the mortgagee any sum found or remaining due over and above the amount realized by the sale.

IN WITNESS, &c.

1002. ANOTHER FORM.

THIS INDENTURE made the day of 19 BETWEEN *A B* of, &c., hereinafter called the mortgagor, of the one part, and *C D* of, &c., hereinafter called the mortgagee, of the other part, WITNESSETH that in consideration of the sum of Rs. paid to the mortgagor by the mortgagee and NOW THIS INDENTURE witnesseth that in pursuance of the said agreement and in consideration of Rs. , this day paid to the mortgagor by the mortgagee, HE the mortgagor doth hereby covenant with the mortgagees, that he the mortgagor will, on the day of 19—, pay to the mortgagee the sum of Rs. with interest for the same in the meantime at the rate of Rs. per cent. per annum, AND if the said sum or any part thereof shall remain unpaid after the said day of 19—, will thenceforth pay to the mortgagee interest for the same or so much thereof as shall for the time being remain unpaid at the rate of Rs. per cent. per annum by equal half-yearly payments on the day of and the day of AND as a security for the said consideration of Rs. the

¹ Add if necessary "by way of simple mortgage."

mortgagor hereby mortgages unto the mortgagee ALL THAT¹ village, &c.

IN WITNESS, &c.

1003. ANOTHER FORM.

THIS INDENTURE, made the day of , BETWEEN *A B* of, &c. (*mortgagor*), of the one part, and *C D* of, &c. (*mortgagee*), of the other part, WITNESSETH that in consideration of the sum of Rs. now paid to the said *A B* by the said *C D* (the receipt whereof the said *A B* hereby acknowledges), the said *A B* doth hereby mortgage by way of simple mortgage unto *C D*, his executors, administrators, and assigns, all and singular the messuages, and tenements specifically described in the schedule hereto annexed, by way of security for the payment of the said sum of Rs. and interest thereon at the rate of Rs. per cent. per annum; AND the said *A B* doth agree that he will pay to the said *C D* the principal sum aforesaid, together with the interest then due, on the day of 19 ; AND the said *A B* doth also agree with the said *C D* that he will at all times during the continuance of the security keep and preserve the said property from destruction or deterioration and will neither sell, mortgage or otherwise alienate the same so as to prejudice the rights by the said *C D*; AND the said *A B* further agrees that on his failure to pay the said sum of Rs. with the interest then due on the said *C D* shall be entitled to cause the said property to be sold and with the proceeds to satisfy his claim; and FURTHER should the claim be not then satisfied the said *A B* doth agree with the said *C D* that he will pay the balance from his person and other property and the said *C D* may recover the same from him, his heirs, executors and assigns.

IN WITNESS, &c.

THE SCHEDULE above referred to.

1004. ANOTHER FORM.

Usually adopted in Indian Conveyancing.

WE, Mohan Singh and Narottam Singh, sons of Jalam Singh, proprietors of the full sixteen annas of M. Domri situate in the Tehsil of *A* in the District of *B*, do hereby covenant and declare as follows:—

Our father having died intestate on day of 19—, leaving us his only heirs, we desire to pay off the debts left owing by him, and accordingly we have thus borrowed from Makhan Lal the sum of Rs. , for which we agree to pay interest at the rate of Rs. per mensem. As security for the loan, we do

¹ Property specifically described in the schedule hereto annexed.

hereby mortgage the whole of our said village together with all the *sir*,¹ *tirha* items, high and low lands, water and forest produce, water places and tanks, cultivated, uncultivated, saline, waste and jungle lands; village sites, ponds, *kutchra* and *pakka* wells, collection houses, tenant's quarters, bamboo clumps, groves and detached fruit and timber trees of all sorts, and stone and wooden mills, inclusive of all the proprietary and cultivating rights in the said village, without exclusion of any right or property to us, the executants. AND we agree to pay the said sum of Rs. together with interest on or before day of 19 at our pleasure, and should we fail to pay the whole or any part of the said sum, we authorize the mortgagee to cause the said property hereby mortgaged by us, to be sold with a view to satisfy his claim. AND we further agree that we shall be liable to pay such sum as may remain to be realized after the sale of the said property. We also agree not to alienate or otherwise cause deterioration of the security and we declare that should we, our heirs and assigns break the covenant in this respect the mortgagee will then be entitled to recover at once the mortgage-money, and the said mortgage-money shall become then due: AND we further agree that if the interest on the said sum agreed to be paid at per cent. per mensem is not paid regularly at the end of each year calculated from the date of this deed, we shall then be liable to pay interest at the enhanced rate of per cent. per annum, calculated from the date of the execution of this deed, and such interest shall be added to the principal at the end of each year after which interest at the rate of shall commence to run on the sum so made up. Any sums paid by us will be either indorsed in our own hand on this deed, or we shall take a receipt therefor, failing which we shall not claim nor be entitled to any deduction on account of repayment which we might set up.

We have duly and deliberately executed this deed, in token whereof we affix our respective signatures.

Here describe
the boundaries
&c., of the property.

1005. MORTGAGE OF A LEASE BY CONDITIONAL SALE.

THIS INDENTURE, made the day of 19, BETWEEN *A B*, of, &c. (*mortgagor*), of the one part, and *C D* of, &c. (*mortgagee*), of the other part. [WHEREAS by an indenture of lease dated the day of 19 made between *E F*, &c., of the one part, and the said *A B* of the other part; ALL that messuage or tenement, &c., were demised unto the said *A B* on a perpetual

¹ Add if necessary "with all the cultivating rights therein, and for which we have duly obtained the necessary sanction of the Deputy Commissioner of."

lease at the yearly rental of Rs. , and subject to the covenants and conditions in the said indenture of lease contained: AND WHEREAS the said *C D* has agreed at the request of the said *A B* to lend to him the sum of Rs. upon leaving the repayment thereof with interest secured to him in the manner hereinafter expressed.] NOW THIS INDENTURE WITNESSETH that in consideration of the sum of Rs. paid to the said *A B* by the said *C D*, on or before the execution of these presents (the receipt whereof the said *A B* hereby acknowledges) the said *A B* hereby covenants with the said *C D* to pay to him on the day of the sum of Rs. with interest in the meantime after the rate of Rs. per cent. per mensem computed from the date of these presents; and also so long after that day as any principal money remains due under these presents; to pay to him interest thereon after the same rate by equal half-yearly payments on the day of , and the day of : AND THIS INDENTURE WITNESSETH that for the consideration aforesaid the said *A B* as beneficial owner mortgages as a security by conditional sale unto the said *C D*. The message and premises comprised in the hereinbefore recited indenture of lease: AND he the said *A B* agrees with *C D* that if the said *A B* does not pay the amount of the consideration with the interest then due on the day of 19 , the said *C D* will be entitled to foreclose the said property and thereafter the said *A B*, his heirs, executors and assigns shall be absolutely debarred of all rights to redeem the same.

IN WITNESS, &c.

To the above may be added the following clauses wherever necessary:—

Whereas the said *A B* is the sole surviving wife of the late *P Q* who died intestate on the day of 19 , AND WHEREAS the said *P Q* had enjoined upon the said *A B* to pay off the debts of *M N* contracted by him by an Indenture dated the day of 19 , NOW THIS INDENTURE WITNESSETH, &c.

(2) AND the said *A B* hereby further covenants with the said *C D* that if the interest after the rate of Rs. per cent. per mensem is not paid at the end of each year calculated from the date of these presents, then the said *A B* agrees to pay interest at the enhanced rate of Rs. per cent. per mensem upon the said sum: AND it is further agreed that the amount of interest due at the end of each year shall be deemed to be added to the amount of principal already due, and thenceforward interest on the sum so made up shall continue to run from year to year.

(3) AND the said *A B* further agrees and declares that *C D* having agreed to lend him the aforesaid sum at the abnormally low rate of interest the said *A B* willingly agrees that if the interest, &c. [see above].

(4) PROVIDED ALWAYS that the said *A B* shall be entitled to redeem at his option the said mortgage at any time before the day of 19

or

PROVIDED ALWAYS that in no case shall the said *A B* be entitled to redeem by paying off the amount of consideration before the day last mentioned, that is to say the day of 19

(5) AND IT IS HEREBY AGREED AND DECLARED, that it shall be lawful for the said *C D*, his executors, administrators, or assigns, at any time or times, without any further consent on the part of the said *A B*, his executors, administrators, or assigns, to sell the messuage and premises hereby demised, or expressed so to be, or any part thereof, either by public auction or private contract, and either with or without special conditions or stipulation relative to title or otherwise, with power to buy in at sales by auction, to rescind contracts for sale, and to resell without being answerable for any loss or diminution in price, and with power also to execute assurances, give effectual receipts for the purchase-money, and do all other acts and things for completing the sale which the said *C D*, his executors, administrators, or assigns shall think proper: AND IT IS HEREBY AGREED AND DECLARED, that the said *C D*, his executors, administrators, or assigns shall, with and out of the moneys to arise from any such sale as aforesaid, in the first place pay and retain the costs and expenses attending such sale or otherwise incurred in relation to this security, and in the next place pay and satisfy the moneys which shall then be owing upon this security, and shall pay the surplus (if any) to the said *A B*, his executors, administrators, or assigns: provided always, and it is hereby agreed and declared that the power of sale hereinbefore contained shall not be exercised unless default shall be made in payment of the said principal sum of Rs. and interest, and some part thereof respectively, on the said day of next, and also for the space of three calendar months next after a notice in writing requiring payment thereof shall by or on behalf of the said *C D*, his executors, administrators, or assigns, have been given to or left at the usual or last known place of abode in British India of the said *A B*, or one of his executors, or administrators, or left upon or affixed to some part of the premises hereby demised, or unless default shall be made in some half-yearly payment of interest, or some part thereof, for the space of two calendar months after the time hereby appointed for such payment: PROVIDED ALWAYS, and it is hereby declared, that no purchaser at any sale made under the power hereinbefore contained shall be bound or concerned to see or inquire whether any such default has been made, or whether any such notice has been given or left or affixed as aforesaid, or otherwise as to the necessity or propriety of such sale, or be affected by notice that no such default has been made, or notice given or left or affixed as aforesaid, or that the sale is otherwise unnecessary or improper: AND IT IS HEREBY DECLARED that the said power of sale may be exercised by any person or

persons for the time being entitled to receive and give a discharge for the moneys for the time being owing on the security of these presents: AND IT IS HEREBY ALSO DECLARED that after any sale made under the aforesaid power, the said *A B*, his executors, administrators, and assigns, shall stand possessed of the premises sold for the last day of the term granted by the hereinbefore recited indenture of lease, IN trust for the purchaser, his executors, administrators, and assigns, and to be assigned and disposed of as he or they may direct.

1006. FORM OF AN EQUITABLE MORTGAGE.

MEMORANDUM that on this day of 19 ,
A B of, &c. (*mortgagor*), has deposited with *C D* of, &c. (*mortgagee*), the documents comprised in the schedule hereto, with intent to create an equitable mortgage on all the property comprised therein, or to which the same relate, for securing the repayment by the said *A B* to the said *C D*, on the day of , of the sum of Rs. which has been advanced by the said *C D* to the said *A B*, together with interest thereon, after the rate of Rs. per cent. per annum, to be computed from the date hereof, and also for the repayment of such further sum or sums as shall at any time or times hereafter, whilst the said documents shall continue in the possession of the said *C D* be advanced by him to the said *A B*, together with interest thereon after the rate aforesaid, to be computed from the time or respective times of advancing the same respectively, at the expiration of six calendar months from the time or respective times of such respective advances being made: AND THE SAID *A B* agrees at any time or times during the continuance of this security upon the request of the said *C D*, but at the cost of the said *A B* to execute to the said *C D* a legal mortgage of the said property, with such powers and provisions and in such form as the said *C D* may require for further securing the said principal moneys and interest.

IN WITNESS, &c.¹

THE SCHEDULE above referred to.

1007. ANOTHER FORM.

BE IT REMEMBERED that on this day day of 19 ,
the title-deeds specified in the schedule hereto, which relate to certain lands containing or thereabouts, situate at in the district of , and belonging to *A B* of, &c., have been deposited by him with *C D* of, by way of equitable mortgage of the said premises for securing the repayment to the said *C D* of the sum of Rs. this day advanced by him to the said *A B*

¹ Pridenour's Conveyancing (14th Ed.), 1, p. 636.

with interest for the same from this day at the rate of Rs. per cent. per annum half-yearly.

IN WITNESS, &c.

SCHEDULE OF DEEDS.

1008. FORM OF AN ENGLISH MORTGAGE.

THIS INDENTURE, made the day of 19 , BETWEEN *A B* of, &c. (*mortgagor*) (hereinafter called the mortgagor), of the one part, and *C D* of, &c. (*mortgagee*) (hereinafter called the mortgagee), of the other part: WITNESSETH that in consideration of the sum of Rs. paid¹ to the said mortgagor by the mortgagee (the receipt whereof the said mortgagor hereby acknowledges), the said mortgagor hereby covenants to pay him on the day of next, the sum of Rs. with interest thereon in the meantime after the rate of Rs. per cent. per annum, computed from the date of these presents; and also so long after that day as any principal money remains due under these presents, to pay to him interest thereon after the same rate by equal half-yearly payments on the day of , and the day of : AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said mortgagor, as beneficial owner, hereby conveys unto the said mortgagee ALL, &c. [*here describe the property mortgaged*],² TO HOLD the same unto and to the use of the said mortgagee, in fee simple: PROVIDED ALWAYS, that if the said sum of Rs. , with interest thereon, shall be paid on the day of , next, according to the foregoing covenant in that behalf, the said premises shall, at the request and cost of the said mortgagor, his heirs or assigns, be conveyed to him or them.

III.—LEASES.

1009. AGREEMENT FOR A LEASE.

BE IT REMEMBERED that *A B* of, &c. (intended lessor), hereby agrees to let, and *C D* of, &c. (intended lessee), to take ALL THAT, &c. (*parcels*), for years, from the day of , at the yearly rent of Rs. , clear of all existing and future taxes, rates and outgoings, and to be payable by equal half-yearly payments on the day of , and the day of , in every year, the first of such payments to be made on the day

¹ Or "this day paid," or "paid on or before the execution of these presents."

² "All that village known as Dangaria, situate in Tehsil of in the District of , and containing acres, together with all the proprietary and cultivating rights in the *air khudbast* and other lands appertaining thereto, together with all rights in the several properties more particularly mentioned in the schedule hereinafter annexed."

of next. And that the said *C D* shall keep the premises, and at the end of the term give them up in the same order and repair as they are now in, and shall keep them insured against loss by fire in a sum not less than Rs. , and, when required, produce the policy of such insurance, and the receipts for the premiums.

IN WITNESS, &c.

1010. ANOTHER FORM.

AN AGREEMENT, made this day of , BETWEEN *A B* of, &c. (intended lessor), of the one part, and *C D* of, &c. (intended lessee), of the other part, as follows: The said *A B* will, on the request and at the cost of *C D*, grant to the *C D*, and *C D* will accept, a lease of THE HOUSE numbered in street, in the district of , with the appurtenances, for the term of one year from the day of , and so on from year to year, until the demise shall be determined at the end of the first or any subsequent year by one party giving to the other not less than three calendar months' previous notice in writing, at the YEARLY RENT of Rs. , payable quarterly, without deduction, on the usual quarter days, that is to say, on the day of , the day of , the day of and on the day of . THE LEASE shall contain the following covenants by the tenant, namely, TO PAY the rent on the day and in manner aforesaid: AND TO PAY all existing and future taxes, rates, assessments, and outgoings of every description, for the time being payable in respect of the said premises, AND TO KEEP the premises in good condition and complete repair during the term, AND in such condition and repair to deliver up the same at the expiration or sooner determination of the lease. NOT to carry on any noisome or offensive trade upon the premises. NOT to assign, or underlet, or part with the possession of the premises, without the consent in writing of the landlord. AND A PROVISIO for re-entry, if and whenever any part of the rent shall be at any time in arrear for twenty-one days, or if and whenever there shall be a breach of any of the tenant's covenants. AND the usual qualified covenant by the landlord for quiet enjoyment by the tenant. THESE PRESENTS are not intended to give the tenant any legal interest in the premises until the execution of the said lease.

IN WITNESS, &c.¹

1011. LEASE OF A HOUSE FROM YEAR TO YEAR OR FOR A TERM EXCEEDING ONE YEAR.

THIS INDENTURE, made the day of 19 , BETWEEN *A B* of, &c. (*landlord*) hereinafter called the landlord, of the one part, and *C D* of, &c. (*tenant*) hereinafter called the tenant,

¹ Davidson's Conveyancing (17th Ed.), 347, 349.

of the other part: WITNESSETH, that in consideration of the rent hereinafter reserved, and of the lessee's covenants hereinafter contained, the landlord hereby demises unto the said tenant ALL THAT messuage or dwelling-house, &c. (*describe the property leased*), TO HOLD the same unto the lessee, for the term of one year (or years) from the day of YIELDING AND PAYING during the said term the rent of Rs. , by four equal quarterly payments, on the day of , the day of , the day of , and the day of (or in every year), the first quarterly payment to be made on the day of next: AND the lessee hereby covenants with the lessor, in manner following (that is to say): That the lessee will pay the rent hereby reserved at the time and in manner aforesaid, and will also pay all rates, taxes, and assessments whatever, which now are, or during the said term shall be, imposed or assessed upon the said premises or the landlord or tenant in respect thereof, by authority of Government or otherwise: AND ALSO will at all times during the said term keep the premises in good and substantial repair, and the same in good and substantial repair deliver up to the lessor at the expiration or sooner determination of the said term: AND will permit the lessor, or his agent, with or without workmen, and others, at convenient hours in the daytime to enter into and upon the said premises, and view and examine the state and condition thereof, and of all such decays, defects, and wants of reparation as shall be then and there found, to give to the lessee notice in writing to repair and amend the same within six calendar months then next following, within which time the lessee will repair and amend the same accordingly: AND ALSO will not at any time during the said term carry on or permit to be carried on any trade or business upon the said premises, or permit the same to be occupied or used in any other manner than as a private dwelling-house:¹ PROVIDED ALWAYS, and it is hereby declared, that if the said yearly rent of Rs. , or any part thereof, shall be in arrear for the space of twenty-one days next after any of the days whereon the same ought to be paid as aforesaid, whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance of the lessee's covenants hereinbefore contained, then and in any of the said cases it shall be lawful for the lessor, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess, and enjoy as in his former estate: PROVIDED ALWAYS, and it is hereby declared, that if the lessee shall be desirous of determining this lease at the end of the first years of the said term, and of such desire shall give to the lessor or his agent, or leave at his usual or last known place of abode in British India, six calendar months' previous notice in writing, then and in such case at the end of such years, the term hereby granted

¹ Add, if necessary, "without the consent in writing of the lessor, first had and obtained, unless such consent shall be unreasonably withheld."

shall cease, but subject to the rights and remedies of the lessor for or in respect of any rent in arrear, or any breach of any of the lessee's covenants: AND the lessor hereby covenants with the lessee, that the lessee paying the rent hereby reserved, and observing and performing the covenants and conditions herein contained, and on his part to be observed and performed, shall and may peaceably and quietly possess and enjoy the said premises hereby demised during the said term without any lawful interruption from or by the lessor or any person rightfully claiming from or under him. AND IT IS DECLARED that where the context allows the expressions "the lessor" and "the lessee" used in these presents include besides the said *A B*, his heirs and assigns, and besides the said *C D*, his executors, administrators, and assigns.

IN WITNESS, &c.¹

1012. ANOTHER FORM.

THIS INDENTURE, made the day of 19 .
BETWEEN *A B* of, &c. [*lessor*], of the one part, and *C D* of, &c. [*lessee*], of the other part: WITNESSETH and declares as follows:—

(1) Here insert the several conditions.

1013. NOTICE TO QUIT TO A TENANT FROM YEAR TO YEAR.

You are hereby required to quit and deliver up on the day of 19 ,² the possession of the messuage or tenement situate, &c. (here describe the property), which you now hold of me. Dated the day of .

To *C D* (*Tenant*).

(*Landlord*).

1014. NOTICE TO QUIT BY A TENANT FROM YEAR TO YEAR.

I hereby give you notice that I shall quit and deliver up on the day of 19 ,³ the possession of the messuage, &c., which I now hold of you as a yearly tenant. Dated day of .

To (*Landlord*).

(*Tenant*).

¹ *Prideaux's Conveyancing* (14th Ed., II, p. 53).

² Where the date of the commencement of the tenancy is not known, the following may preferably be substituted: "At the expiration of the year of your tenancy, which will expire at or next after the end of half a year from the time of your being served with this notice." See *Sidebotham v. Holland* [1895], 1 Q. B., 578 and § 733.

³ Or "on the day on which the current year of my tenancy will expire next after the end of half a year from the time of your being served with this notice."

1015. NOTICE BY A TENANT TO DETERMINE A LEASE.

I hereby give you notice that, in pursuance of the power for this purpose given to me by the indenture of lease dated the day of , and made between you of the one part, and me of the other part, it is my intention to determine the lease thereby made on the day of next, and I shall therefore quit and deliver up possession to you of the messuage and premises situate at, &c., comprised in the said indenture of lease on the said day of .

To *C D (Landlord).*

A B (Tenant).

1016. NOTICE TO QUIT GIVEN BY AN AGENT OF THE LANDLORD.

To *A B.*

SIR,

I hereby, as for [*C D, landlord*], your landlord, and on his behalf, give you notice to quit and deliver up possession of the house (or other property *which mention*) and premises, with the appurtenances, situate at——in the district of——, which you hold of him as a tenant thereof, at the expiration of the current month (or year, *as the case may be*).

Dated the——day of——19 .

Yours, &c.,

P Q,

Agent for the above *C D.*

1017. NOTICE TO QUIT GIVEN BY AN AGENT OF THE TENANT.

To *A B.*

SIR,

I hereby, as agent for *C D*, your tenant, and on his behalf, give you notice that it is his intention to quit and deliver up possession of the house and premises, with the appurtenances, at——in the district of——now held by him as your tenant thereof, at the expiration of the current month (or year *as the case may be*).

Dated the——day of——19 .

Yours, &c.,

P Q,

Agent for the above *C D.*

IV.—EXCHANGES.

1021. EXCHANGES BY SEPARATE MUTUAL CONVEYANCES.

THIS INDENTURE, made the ——— day of ———, BETWEEN *A B*, of, &c. (*vendor*), of the one part, and *C D* of, &c. (*purchaser*) of the other part. WHEREAS the said *A B* being seised in fee simple of the hereditaments comprised in the first schedule hereto, and the said *C D* being seised in fee simple of the hereditaments comprised in the second schedule hereto, have agreed to exchange the same: AND WHEREAS, in part performance of the said agreement by an indenture bearing even date with these presents, and made between the said *C D* of the one part, and the said *A B* of the other part, the hereditaments comprised in the second schedule hereunto have been conveyed by the said *C D* unto and to the use of the said *A B* in fee simple: NOW THIS INDENTURE WITNESSETH, that in further pursuance of the aforesaid agreement, and in consideration of the premises, the said *A B*, as beneficial owner, hereby conveys unto the said *C D* the hereditaments comprised in the first schedule hereto unto and to the use of *C D* in fee simple. IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THE FIRST SCHEDULE above referred to.

THE SECOND SCHEDULE above referred to.

1022. ANOTHER FORM.

EXCHANGE WHERE MONEY IS PAID TO EQUALIZE.

THIS INDENTURE, made the ——— day of ——— 19 ———, BETWEEN *A B* of, &c., of the one part, and *C D* of, &c., of the other part, WITNESSETH, that in consideration of the conveyance by the said *C D* hereinafter contained, and of the sum of Rs. ———, paid to the said *A B* by the said *C D* on or before the execution of those presents for equality of exchange (the receipt whereof the said *A B* hereby acknowledges). THE SAID *A B*, as beneficial owner, hereby conveys unto the said *C D*, ALL, &c. (*here describe the property*): TO HOLD the same unto and to the use of the said *C D* in fee simple: AND THIS INDENTURE ALSO WITNESSETH, that in consideration of the conveyance by the said *A B* hereinafter contained, the said *C D*, as beneficial owner, hereby conveys unto the said *A B*, ALL, &c. (*describe here the property taken in exchange*): TO HOLD the same unto and to the use of the said *A B* in fee simple. IN WITNESS, &c.

1023. PARTITION.

THIS INDENTURE made, &c., BETWEEN *A B* of, &c., of the first part, *C D* of, &c., and *E F* of, &c., of the second part, and *G H* of, &c., of the third part. WHEREAS *A B* is seized of all that property set forth in the first schedule hereunto annexed, AND WHEREAS the said *C D*, and *E E*, are also seized of a portion of the property belonging to the joint family estate, and which is separately shewn in the second schedule hereunto annexed, AND WHEREAS the said *A B*, *C D*, *E F*, and *G H* being uterine brothers are each entitled to a definite share in the said property. AND WHEREAS the said *A B*, *C D*, *E F*, and *G H*, have agreed to make partition of the same hereditaments in the shares and manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the premises, and of Rs. — this day for equality of partition, paid to the said *C D*, by the said *A B*, *C D*, and *E F* in equal shares, the said *A B*, as BENEFICIAL OWNER as beneficial owner of the undivided property doth hereby convey unto and to the use of *C D* all that property set forth in the third schedule hereunto annexed being one-fourth as far as may be of the property to which the said *A B*, *C D*, *E F*, and *G H* are entitled.

IN WITNESS, &c.

THE FIRST SCHEDULE, above referred to.

[In a partition it is more convenient to execute mutual conveyances, in which the wording of form No. 1021 may be generally followed.]

V.—GIFTS.

1024. DEED OF GIFT WITHOUT CONDITIONS ATTACHED.

KNOW ALL MEN BY THESE PRESENTS, that *A B* of &c. (*donor*) doth by this deed hereby freely and voluntarily convey unto *C D* of, &c., (*donee*) ALL that, &c. (*here describe the property*): TO HOLD the said unto and to the use of the said *C D* in fee simple. IN WITNESS, &c.

1025. GIFT FOR PURPOSE SPECIFIED.

THIS INDENTURE, made the — day of — 19 —, BETWEEN *A B* of, &c. (*donor*), of the one part, and *C D* of, &c. (*donee*) of the other part, WITNESSETH, that the said *A B* doth hereby freely and voluntarily, and without any valuable consideration, convey unto the said *C D* and his successors, ALL THAT piece of land (*here enter description*), TO HOLD the same unto and to the use of the said *C D* and his successors, TO THE INTENT that a temple may be built upon a part of the said piece of land, and that the remainder of the said piece of land may be appropriated as and for a garden; for the use of the said temple, and generally

to the intent that the said piece of land shall henceforth be devoted to the augmentation of the maintenance of the said temple.

IN WITNESS, &c.

1026. GIFT IN TRUST TO CHARITY.

THIS INDENTURE, made — day of — 19 —, BETWEEN *A B* of, &c. (*donor*), of the one part, and the said *A B, C D* of, &c., *E F* of, &c. (*trustees*) of the second part. WHEREAS it is proposed to erect a *serai* for the use of travellers of all denominations, and a committee has been appointed to collect subscriptions for the building and endowment thereof, and the parties hereto of the second part are members of such committee. AND WHEREAS the said *A B* has agreed to give the piece of land hereinafter described as a site for such *serai*. NOW THIS INDENTURE WITNESSETH, that the said *A B* hereby conveys unto the said parties hereto of the second part, ALL that, &c. (*describe land*), TO HOLD the same unto and to the use of the said parties hereto of the second part in fee simple: AND IT IS AGREED AND declared that the parties hereto of the second part and their successors in office for the time being (hereinafter "called the trustees") shall stand possessed of the land hereby conveyed and the building or buildings to be erected thereon.

IN TRUST to permit the same to be used as a *serai* at all times of the year and without charge: AND IT IS HEREBY DECLARED that if hereafter any rules and regulations have to be framed by the trustees, &c.

VI.—ASSIGNMENTS.

1027. ASSIGNMENT OF AN ACTIONABLE CLAIM.

THIS INDENTURE, made the — day of — 19 —, BETWEEN *C D* of, &c. (*vendor*), of the one part, and *C D* of, &c. (*purchaser*), of the other part. WITNESSETH, that, in consideration of Rs. —, to the said *A B* this day paid by the said *C D* (the receipt whereof the said *A B* doth hereby acknowledge), he the said *A B* AS BENEFICIAL OWNER doth hereby assign unto to the said *C D*, his executors, administrators, and assigns, ALL THAT policy of assurance on the life of him the said *A B* granted by the — Life Insurance Company dated the — day of —, numbered —, for the sum of Rs. —, and under the annual premium of Rs. —: AND all money assured or to become payable by or under the said policy and the full benefit thereof, with power to give an effectual discharge for all moneys so assured, or to become payable (*here describe the property*); TO HOLD the premises unto the said *C D*, his executors, administrators, and assigns. AND the said *A B* doth hereby covenant with the said *C D* that he the said *A B* will not do or knowingly suffer anything, whereby the said policy

may be rendered void or voidable, or the said *C D* his executors, administrators, or assigns may be prevented from receiving the said sum of Rs.—, or any bonuses or addition thereto, or any part thereof respectively: AND THAT if the said *A B* shall do or suffer anything whereby any additional premium or payment shall become payable for keeping the said policy in force, then he, the said *A B*, will, at all times, duly and punctually pay such additional premium or payment, so as to keep the said policy in force.

IN WITNESS, &c.

1028. ANOTHER FORM.

THIS INDENTURE, made the—— day of —— 19 , BETWEEN *A B* of, &c. (*vendtor*), of the one part, and *C D* of, &c., (*purchaser*), of the other part. WHEREAS, under an indenture, dated, &c., and expressed to be made between the said *A B* and *P Q* the said *A B*, became entitled to (*describe here the property*): Now THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of Rs.—, this day paid to the said *A B*; he the said *A B*, AS BENEFICIAL OWNER, doth hereby assign unto the said *C D*, &c. (*here continue as in the above precedent*).

1029. ASSIGNMENT OF A POLICY OF INSURANCES BY INDORSEMENT.

I, *A B* of, &c., do hereby assign unto *C D*, &c., his executors, administrators, and assigns, the within Policy of Assurance on the ship, freight, and the goods therein carried [or on ship or freight or goods, *as the case may be*].

IN WITNESS WHEREOF, &c.¹

1030. NOTICE OF ASSIGNMENT.

To *A B* [*the obligor*].

I, the undersigned *C D* of, &c. (*assignee*), hereby give you NOTICE, that, by an indenture, bearing date, &c., and made, &c., a certain bond or obligation in writing under your hand and seal, bearing date, &c., whereby you became bound for yourself, and your heirs, executors, and administrators, unto *M N* (*the obligee*) of, &c., in the sum of Rs. —, has in consideration of Rs. —, been assigned by him the said *M N*, to me, my executors, administrators and assigns: AND WHEREAS the said *M N* has refused to give you notice under his hand of the assignment, I therefore hereby give you NOTICE to pay the said sum of Rs. —, and all interest to become due upon or in respect thereof from the said — day

¹ This form is prescribed by the Assignees of Marine Policies Act, 1868, 31 and 32 Vic., ch. 86 (see sec. 133, *note*, §§ 965–967).

of ——— last (*the date of the assignment*) to me, my executors, administrators, or assigns, or as I, or they shall direct.

Dated this ——— day of ——— 19 .

C D (the assignee).

1081. ANOTHER FORM.

To *A B (obligor).*

WHEREAS by an instrument in writing bearing date, &c., and made between *A B* and *C D*, the said *C D* has assigned and transferred to me a certain debt or sum of money, amounting to the sum of Rs. ———, due from you to the said *C D* on simple contract in consideration of Rs. ———, but as the said *A B* has refused to give you notice of this assignment to me under his signature, I beg to give you NOTICE of the said assignment to me and request to pay the said sum of Rs. ——— and all interest to become due upon or in respect thereof from the said ——— day of ——— last to me, my executors, administrators, or assigns, or as I, or they shall direct.

Dated this ——— day of ——— 19 .

A B (assignee).

1082. NOTICE BY THE ASSIGNOR.

To *A B (obligor).*

I, the undersigned *C D (the assignor)*, DO HEREBY GIVE YOU NOTICE, that, by a certain instrument in writing, bearing date, &c., and made between me and *A B*, &c., I, the said *C D*, have for the valuable consideration therein mentioned, sold and assigned to the said *P Q*, his executors, administrators and assigns, ALL THAT, &c., TOGETHER with all arrears of the said, &c., then due and payable. And I GIVE YOU FURTHER NOTICE and require you henceforth to pay the said sum or sums unto the said *P Q*, his executors, administrators, or assigns for his and their own use and benefit.

Dated this day of ——— 19—.

C. D. (the assignor).

THE TRANSFER OF PROPERTY BILL, 1879.

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THE SCHEDULE.

A BILL

TO

*Amend the law relating to the Transfer of Property by act
of Parties.*

[AS REVISED BY THE INDIAN LAW COMMISSION, 1879.]

WHEREAS it is expedient to define and amend certain
parts of the law relating to the transfer
Preamble. of property by act of parties; It is
hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. This Act may be called "The Transfer of Property Bill III, c. 1.
Act, 1879 :"

Short title.

It extends to the whole of British
Extent. India;

Commencement. And it shall come into force on the
first day of *March*, 1880.

2. On and from that day the enactments specified in Bill III, c. 2.
the schedule hereto annexed shall be
Repeal of Acts. repealed to the extent mentioned in the
third column thereof. But nothing herein contained shall
be deemed to affect—

Saving of cer-
tain enactments,
incidents, rights,
liabilities, &c.

(a) the provisions of any enactment Act IX of
not hereby expressly repealed : 1872, s. 1.

(b) any terms or incidents of any
contract or constitution of property
which are consistent with the provisions of this Act and
are allowed by the law for the time being in force :

(c) any right or liability arising out of a custom or 4 Ben. A. C.,
personal law consistent with this Act, or out 219.
of a legal relation constituted before this Act
comes into force, or any relief in respect of any
such right or liability :

(d) any transfer by operation of law or by decree or I. L. R., 2
order of a Court of competent jurisdiction. Bom., 541.

Bill III, s. 3 :
Report, s. 2 :
N. Y. Code,
para. 159.

Interpretation-
clause. 3. In this Act, unless there be some-
thing repugnant in the subject or
context—

the "ownership" of a thing is the right of one or more
persons to possess and use it to the
exclusion of others. Such ownership
is either absolute or qualified. The thing of which
there may be ownership is called "pro-
perty."

Act III of
1877, s. 17, cl.
(b).

"assurance" means any non-testamentary instrument
which purports or operates to create,
transfer, or otherwise dispose of, whether
in present or in future, any right, title or interest, to or in
immoveable property :

"registered" means registered in British India under
the law for the time being in force
regulating the registration of documents :

"attached to the earth" means—

(a) rooted in the earth, as in the case
of trees and shrubs ;

See ss. 18, 44,
cl. (s), 61.

(b) imbedded in or permanently resting upon the
earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded or so rests, for the
permanent beneficial enjoyment of that to which
it is attached :

See Contract
Act, s. 229,
as to agent :
4 Cal., 212 :
s. 11 Ben., 54,
P. C.

and a person is said to have "notice" of a fact when he
actually knows that fact, or when but
for wilful abstention from an inquiry
which he ought to have made, or gross negligence, he would
have known it or when information of the fact is given to
or obtained by his agent under the circumstances men-
tioned in the Indian Contract Act, section 229.

Bill III, s. 4.

Enactments re-
lating to contracts
to be taken as part
of Act IX of 1872.

4. The chapters and sections of this
Act which relate to contracts shall be
taken as part of the Indian Contract
Act, 1872.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(4).—*Transfer of Property, whether moveable or immoveable.*

N. Y. Code,
s. 458.

5. In the following sections "transfer" means an act by
which one living person conveys to
another, or to himself and another, in
present or in future, the ownership of
property or an interest therein, and "to transfer" is to per-
form such act.

6. The ownership of property of any kind may be transferred, except as otherwise provided by this section or by any other law for the time being in force :—

N. Y. Code,
s. 460.

What may be
transferred.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other merely contingent or possible right or interest, cannot be transferred to any one except the present or future owner or co-owner of the property affected thereby.

N. Y. Code,
s. 461: *Carlton*
v. *Peighton*, 8
Mer. cl. Act X
of 1877, s. 266,
cl. (k).

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

N. Y. Code,
s. 462: *Smith*
v. *Packhurst*,
Atk., 189.

(c) An easement cannot be transferred otherwise than by release to the owner of the servient heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A mere right to sue for compensation for a fraud or for harm illegally caused to body, mind or reputation cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer whether before or after it has become payable.

Cf. 11 & 12
Vic., c. 21, 27.

(g) Stipends allowed to military and civil pensioners of Government and political pensioners cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Persons compe-
tent to transfer.

Bill III, s. 5:
Report, s. 4.

property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in such property, and in the legal incidents thereof.

Operation of
transfer.

Bill III, s. 6:
Report, s. 10:
v. last clause,
Report, s. 6:
2 W. R., 125
(buildings): 14
W. R., 379.

of passing in such property, and in the legal incidents thereof.

N.-W. P., 1870, p. 251, 24 W. R., 38C: (trees), "everything grown on it," Morley N. S., 259. Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ; and, where the property is machinery attached to the earth, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor, but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the ownership passes.

N. Y. Code, s. 453 : 7 Exch., 581. 9. A transfer may be made without writing in every case in which a writing is not expressly required by law.

Report, s. 47 : L. R., 8 Ch. D., 148, 285. 10. Where a transfer is subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his

interest in the property transferred, the condition or limitation is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a married woman, so that she shall not have power to part with the same or her beneficial interest therein.

Act X of 1865, s. 125. 11. Where on a transfer of property an interest is

created in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

Report, s. 48. 12. Where property is transferred subject to a condition

or limitation making any interest therein reserved or given to or for the benefit of any person to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or

limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Where on a transfer of property an interest is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of person not in existence at date of transfer, subject to prior transfer.

Act X of 1865, s. 100: Report, s. 49.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for his second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. No transfer can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

Report, s. 50: Succession Act, s. 101.

15. If on a transfer of property an interest is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class.

Transfer to class some of whom come under sections 13 and 14.

Report, s. 51: *Bentinct v. Duke of Portland*, 7 Ch. D., 698.

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer to take effect on failure of prior transfer.

Report, s. 52.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge,

18. Where the terms of a transfer of property direct that the income arising therefrom shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Direction for accumulation.

Act X of 1865, s. 104: Report, s. 53: *Donaldson v. Donaldson*, L.R., 3 Ch. D., 743.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date: and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

Report, ss. 56, 57, altered. **19.** Where, on a transfer of property, an interest is created in favour of a person without

Vested interest. specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

Report, s. 58, altered. **20.** Where, on a transfer of property, an interest is

Transfer for benefit of person not then living. created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

Act X of 1865, s. 107: Report, s. 59. IX, 72-73. **21.** Where, on a transfer of property, an interest is created in favour of a person to take

Contingent interest. effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where under a transfer a person becomes entitled to an interest in property upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may

be necessary to be applied for his benefit, such interest is not contingent.

22. Where, on a transfer of property, an interest is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Act X of 1865,
s. 108: Report,
s. 60.

Transfer to members of a class who attain a particular age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Act X of
1865, s. 111:
Report, s. 61.

Transfer contingent on happening of specified uncertain event.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Act X of
1865, s. 112.

Transfer to such of certain persons as survive at some period not specified.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Act X of 1865,
s. 118: Act X
of 1865, s. 114,
expanded with
reference to
Act IX of 1872,
s. 28.

Conditional transfer.

Illustrations.

(a) A lets a farm to B on condition that he shall walk ten miles in an hour. The lease is void.

(b) A gives Rs. 500 to B on condition that he shall marry A's daughter, C. At the date of the transfer C was dead. The transfer is void.

(c) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Act X of 1865, s. 115. **26.** Where the terms of a transfer of property impose a condition to be fulfilled before a person

Fulfilment of condition precedent.

can take an interest in the property, the condition shall be deemed to have been

fulfilled if it has been substantially complied with.

Illustrations.

(a) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D*, and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* has fulfilled the condition.

(b) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

Act X of 1865, s. 116. **27.** Where, on a transfer of property, an interest is

Conditional transfer to one person coupled with transfer to another on failure of prior transfer.

created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another if the prior interest under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Act X of 1865, s. 117. But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and if he should neglect to do so, to *C*. *B* dies in *A*'s lifetime. The transfer to *C* takes effect.

(b) *A* transfers property to his wife; but in case she should die in his lifetime, transfers to *B* that which he had transferred to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The transfer to *B* does not take effect.

Act X of 1865, s. 118. **28.** On a transfer of property an interest may be created

Ulterior transfer conditional on happening or not happening of specified event.

to accrue to any person with the condition superadded that in case a specified uncertain event shall happen, such interest shall pass to another person; or that in case a specified uncertain event

shall not happen, such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-seven.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled. Act X of 1885,
s. 119.

Fulfilment of condition subsequent.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it. Act X of 1885,
s. 120.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

31. Subject to the provisions of section twelve, on a transfer of property an interest may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen. Act X of 1885,
s. 121.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Illustrations.

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. A does not go to England within the term prescribed. His interest in the farm ceases.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest. Act X of 1885,
s. 122.

Such condition must not be invalid.

cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute

33. Where, on a transfer of property, an interest is created subject to a condition that the Act X of 1885,
s. 124.

Condition that transferee shall perform act at or before specified time.

person taking it shall perform a certain act at or before a specified time, and the transferor has at the time of creating the interest made an ulterior disposition

thereof in favour of himself or of another if the act be not performed within such time, the prior disposition ceases to

have effect if the act is not performed within such time or if the person benefited by the prior disposition renders the performance of the act impossible within the time specified. But where the transferor has not made any such ulterior disposition thereof, the transfer is, at the option of the transferor, voidable so far as regards such interest, if it was intended that time should be of the essence of the condition; but if it was not so intended, the transfer shall not be so voidable.

The intention referred to in this section is, in the case of a transfer without consideration, the intention of the transferor, and, in the case of a transfer for consideration, the intention of both the transferor and of the person from whom the consideration proceeds.

When such intention is apparent, the circumstance that the interest has actually been enjoyed under the prior disposition does not affect the operation of the condition.

34. Where, on a transfer of property, an interest is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, if the transferor has at the time of the transfer made an ulterior disposition of the interest in favour of another person, the prior disposition ceases to take effect when the person benefited thereby renders impossible or indefinitely postpones the performance of the condition.

But if the transferor has not at the time of the transfer made any such ulterior disposition of the interest, then if the interest was created without consideration it is voidable at the option of the transferor; but if it was created for consideration it shall be so voidable only if adequate compensation for the breach of the condition cannot be made in money.

35. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for

Transfer conditional on performance of act, no time being specified for performance.

Transfer conditional on performance of act, time being specified.

the performance of the act, then if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Election.

36. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property,

Report, s. 68,
added to: 2
Spence, 585.

Election when
necessary.

such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

Act X of 1865,
s. 168.

subject nevertheless,

where the transfer is gratuitous and the transferor has before the election died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustration.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to *B*.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

Act X of 1865,
s. 169.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

Act X of 1865,
s. 171.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Act X of 1865,
s. 172.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer expressed to be in lieu of that property, if such owner claim that he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he has knowledge of his right to elect and of

Act X of 1865,
s. 173.

those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Act X of 1865, s. 174. Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Act X of 1865, s. 175. Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and to C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

Act X of 1865, s. 176. If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

Act X of 1865, s. 167. In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

Report, s. 64 : Bill III, s. 86. **37.** In the absence of a contract to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Severance of Obligation relating to Property.

38. When in consequence of a transfer property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst

Satisfaction of right arising in favour of several persons in consequence of a transfer.

the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Illustrations.

(a) *A* sells to *B*, *C* and *D* land situate in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep, *B* having provided half the purchase-money and *C* and *D* one-quarter each. *E* having notice of this must pay Rs. 15 to *B*, Rs. 7½ to *C*, and Rs. 7½ to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) Each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than ten days' work in all, according to such directions as *B*, *C* and *D* may join in giving.

B.—Transfer of Immoveable Property.

39. Where any person authorised only under circum- Bill III, s. 7.

Transfer by person authorised only under certain circumstances to transfer.

stances in their nature variable to dispose of immoveable property transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the

one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, agrees, for purposes, neither religious nor charitable, to sell a field, part of the property held by her as such, to *B*. *B* satisfies himself by reasonable inquiry that the income of the property is insufficient for *A*'s maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Wilson v. Hare, L. R., 1 Ch., *Richards v. Renell*, 7 Ch. D., 224: *Maclean v. Mackay*, L. R., 5 P. (32), S. A., 135 of 1877.

40. Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such right does not amount to a charge on such property, or

where for the more beneficial enjoyment of his own immoveable property a third person has independently of any interest in the immoveable property of another, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustrations.

(a) *A*, a Hindu, transfers Sultanpur to his sister-in-law *B*, in lieu of her claim against him for maintenance in virtue of his having succeeded to her deceased husband's property, and agrees with her that if she is dispossessed of Sultanpur, *A* will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. *A* sells the specified villages to *C*, who buys in good faith, without notice of the agreement. *B* is dispossessed of Sultanpur. She has no claim on the villages transferred to *C*.

(b) *A*, a Hindu widow, is entitled to maintenance out of the share of her deceased husband in Basaoli, which has passed to his brother *B*. *B* sells Basaoli to *C*, who has notice of *A*'s claim and that there is no other property to satisfy it. *A* may claim maintenance out of Basaoli in the hands of *C*.

(c) *A* contracts to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

Bill III, s. 7:
Act IX of
1872, s. 108,
excepn. 2.

41. Where a person holding immoveable property as its ostensible owner with the consent, express or implied, of the other persons interested therein, transfers such property for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Illustrations.

(a) *A*, one of two co-proprietors of village land, leaves his village, and with his consent the land is registered by the Revenue-officer in the name of *B*, the other co-proprietor. After ten years *B* sells a portion of the land to *C*, who takes reasonable care to ascertain that *B* had power to make the transfer and acts in good faith. *A* is not entitled to have the sale set aside.

(b) *A* buys land and causes it to be transferred to his servant *B* to hold on his behalf, and also causes it to be entered in the revenue register in *B*'s name. *C*, having ascertained that *B* is the registered owner of the land and pays the revenue due in respect thereof, buys the land in good faith. *A* cannot impeach the sale.

42. Where a person having an option to require, or Bill III, s. 10A, para. 2.
authority to revoke, a transfer of any

Transfer by person having option to require or authority to revoke transfer.
immoveable property, transfers the property for consideration, such transfer operates in favour of the transferee (subject to any condition attached to the exercise of the option or authority) in the former case as an exercise of the option, and, in the latter case, as a revocation of the former transfer to the extent of the authority.

Illustrations.

(a) *A* takes a lease of a house from *B* with an option of buying it at a specified price. *A* sells the house to *C*. *C* may require *B* to transfer it to him at the specified price.

(b) *A* lets a house to *B* and reserves power to revoke the lease if in the opinion of a specified surveyor *B* should make a use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B*'s lease subject to the opinion of the surveyor as to *B*'s use of the house having been detrimental to its value.

43. Where a person erroneously represents that he is Canadian Code, s. 1488.
authorized to transfer certain immove-

Transfer by unauthorized person who subsequently acquires interest in property transferred.
able property, and assumes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the Sugd. V. and P., 18th edn., 297.

transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*. Of these *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying *A* obtains *Z* as heir. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

Bill III, s. 9.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Transfer by one
co-owner.

Bill III, s. 18.

45. Where property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled to the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Illustration.

A and *B* are the sons and *C* the grandson of a Hindu who has died leaving property. *C's* father *D* has also died. A partition has been made after which *A* and *B* have reunited. *C* remains severed in interest, his share being one-third. The separate property of *D* is of the same value. The whole fund belonging to *A*, *B* and *C* is expended in buying an estate *X*. *A* and *B* take one moiety of *X* as joint estate, and *C* takes the other moiety as separate property.

46. Where a transfer of immoveable property is made for consideration by persons having distinct interest therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property transferred were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for
consideration by
persons having dis-
tinct interests.

Illustrations.

(a) *A* owning a moiety, and *B* and *C*, each a quarter share of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mauza.

(b) *A*, being entitled to a life interest in mauza Atrali and *B* and *C* to the reversion, sell the mauza for Rs. 1,000. *A*'s life interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase-money, *B* and *C* to receive Rs. 400.

47. Where several co-owners of immoveable property

Transfer by co-owners of share in common property. transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight annas share, and *B* and *C*, each the owner of a four annas share, in mauza Sultanpur, transfer a two-anna share in the mauza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half an anna share from each of the shares of *B* and *C*.

48. Where a person purports to create by transfer at

Priority of rights created by transfer. different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property. Bill III, ss. 17, 86.

Transferee's right under policy. thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom Bill III, s. 8; Act XI of 1855, s. 1.

Rent *bona fide* paid to holder under defective title.

standing it may afterwards appear that the person to whom

such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Act XI of
1855, s. 2:
2 Bom., 225.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee or his representative in interest has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When under the circumstances aforesaid the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to reap and carry them.

Bill III, s. 10:
8 Ben., 478:
7 Mad., 111:
11 Bom., 24, 64,
139: N. W. P.,
1867, p. 301:
10 W. R., 469:
7 W. R., 225:
15 W. R., 372:
28 W. R., 382:
2 Tayl. & Bell,
118: 1 O'Kin.,
303, 309: 5 W.
R. P. C., 68: 8
Bom. A. C. J.,
61: *Berry v.*
Gibbons, L. R.,
8 Ch., 747:
Bill III, s. 10A:
cf. Act I of
1877, s. 85.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

53. Every transfer or forfeiture of immoveable property made or incurred with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer or forfeiture of immoveable property is to defraud, defeat or delay any such person, and such transfer or forfeiture is made or incurred

gratuitously or for a grossly inadequate consideration, the transfer or forfeiture may be presumed to have been made or incurred with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee or person benefiting by the forfeiture in good faith and for consideration, or the rights of Government arising on any forfeiture for non-payment of land-revenue.

CHAPTER III.

OF SALES OF IMMOVABLE PROPERTY.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of immovable property of the value of one hundred rupees and upwards, can be made only by a registered

ASSURANCE.

In the case of immovable property of a value less than one hundred rupees, such transfer may be made either by a registered assurance or by delivery of the property.

Delivery of immovable property takes place, in the case of a reversion or other intangible thing—when the parties consent to the delivery ; and in the case of other immovable property—when the seller places the buyer, or such person as he directs, in possession of the property.

Bill III, s. 11: 14 Ben., 307, 312: N.-W. P., 1866, p. 87: 12 Suth. W. R. P. C., 6: as to the delivery of assurance, W. R., 1864, p. 222: 5 W. R., 248: Morley N. S., 368.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

55. In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(a) The seller is bound—

(1) to disclose to the buyer any defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

Right to redeem, N.-W. P., 1868, p. 376.

Bill III, s. 12. Report, s. 14.

- Bill III, s. 12
(a). (2) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- Bill III, s. 12
(a). (3) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- Bill III, s. 12
(h). (4) on payment or tender of the amount due in respect of the price, to execute a proper assurance of the property when the buyer tenders it to him for execution at a proper time and place, and, where the property is or forms part of, a revenue-paying estate, to present an application to the proper officer for the requisite alteration of the revenue-register ;
- New. (5) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;
- (6) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;
- Bill III, s. 12
(g). (7) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date ; and, where the property is sold free from incumbrances, to discharge all incumbrances on the property then existing ; and
- Bill III, s. 12
(i). (8) where the ownership of the property has passed to the buyer, to deliver to the buyer all documents of title relating thereto which are in the seller's possession or power :

provided that (1), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (2), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (1) the seller, and in case (2) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, or by any person claiming under him, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof as he may require ; and, in the meantime, the seller or the buyer, as the case may be, of the lot of greatest value must keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident ;

(9) and the seller shall be deemed to contract that the interest which he assumes to transfer to the buyer subsists and that he has power to transfer the same : Bill III, s. 12
(j).

provided that where the sale is made by a person in a fiduciary character, he shall be deemed to contract to the like effect, so far only as his knowledge extends.

(b) The seller is entitled—

(1) to the rents and profits of the property till the ownership thereof passes to the buyer ; Bill III, s. 12
(b).

(2) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part. Bill III, s. 12
(d).

(c) The buyer is bound —

(1) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is, and the seller is not, aware, and which increases the value of such interest ; Bill III, s. 13
(b).

(2) to pay or tender, at the time and place of completing the transfer, the purchase-money to the seller or such person as he directs : provided that where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of the incumbrances on the property existing at the date of the transfer, and shall pay the amount so retained to the persons entitled thereto ; Bill III, s. 12
(g): Canadian
Code, s. 1538.

(3) to retransfer the property where the ownership thereof has passed to the buyer before payment of the purchase-money and he fails to pay or tender such money in accordance with the last preceding clause ;

(4) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ; Bill III, s. 12
(c).

(5) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on the incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due. Bill III, s. 15.

(d) The buyer is entitled—

(1) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ; Bill III, s. 12
(c).

(2) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the

seller, to the extent of the seller's interest therein, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and when he properly declines to accept the delivery also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

Bill III, s. 13. An omission to make such disclosures as are mentioned in this section, paragraph (a), clause (1), and paragraph (c), clause (1), is fraudulent.

Bill III, s. 19. **56.** Where two properties are subject to a common charge, and one of the properties is sold to a buyer without notice of the charge the buyer is, as against the seller and the incumbrancer, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of two properties subject to a common charge.

charge, and one of the properties is sold to a buyer without notice of the charge the buyer is, as against the seller and the incumbrancer, in the absence of a

contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

Bill III, s. 21: **57.** (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

Act XXVIII of 1866, s. 19: "Mortgage," "mortgagor" and "mortgagee" defined.

"Mortgage," "mortgagor" and "mortgagee" defined.

specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt,

or the performance of an engagement which may give rise to a pecuniary liability.

English practice followed, with necessary modifications, 5 Rom. A. C. J., 109.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured are called the mortgage-money, and the assurance (if any) by which the transfer is effected is called a mortgage-deed.

Mortgagor need not have present ownership, N.-W. P., 1872, p. 11, *see qu.* 12 Moo. I. A., 275, 306: Colebr. Dig., B. i, c. III, t. 96.

(b) Where the mortgagor binds himself expressly and personally to repay the mortgage-money on a certain date, and, without delivering possession of the property, makes it a collateral security for the repayment, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Where the mortgagor, without delivering possession of the property, ostensibly sells it—

on condition that on default of payment of the mortgage-money on date agreed on the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers or agrees to deliver actual possession of the mortgaged property to the mortgagee on the terms that he shall retain such possession until re-

Usufructuary mortgage.

payment of the mortgage-money, applying the rents and profits accruing from such property in reduction of the amount for the time being due under the mortgage, or accepting such rents and profits in lieu of interest, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a condition that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage. Macph., 8, 12, 50: R. B. Ghose, 218, 219: 2 Moo. I. A., 487.

58. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by registered assurance signed by the mortgagor and attested by at least two witnesses. Bill III, s. 22: see Macph., 53: R. B. Ghose, 64: this applies to defeasances.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by registered assurance signed and attested as aforesaid or by delivery of the property.

Rights and Liabilities of Mortgagor.

59. At any time after the principal money has become payable, the mortgagor, or, where there are more mortgagors than one, any of the mortgagors, has a right, on payment or tender, at a proper time and place, of all sums (if any) remaining due on the mortgage, to require the mortgagee (a) to re-deliver the mortgage-deed, if any, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him, or to execute, and (where the mortgage has been effected by registered assurance) to have registered, an acknowledgment in writing that any right in derogation of his ownership or other interest transferred to the mortgagee has been extinguished. Bill III, s. 23: 5 Ben., 450: 6 Ben., 562: 2 Mad., 420: 7 Mad., 395: in Cen. Provs. 13 Ben., 205: N.-W. P., 1868, p. 204: Bom., 237: no redemption before expiration of period named. Redemption after fixed time has expired, 9 Bom., 69: see 7 Ben., 136 (P. C.)

Right of mortgagor to redeem.

6 Bom. A. C. J., 265: N.-W. P., 1866, p. 128. Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

N.-W. P., 1867, p. 88: 20 W. R., 387: 22 W. R., 262: 24 W. R., 24: N.-W. P., 1870, p. 4: N.-W. P., 1872, p. 92: N.-W. P., 1873, p. 148: R. B. Ghose, 198: 15 Ben., 303. Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagee.

Bill III, s. 29: *contra*, 6 Bom. A. C. J., 90: but see R. B. Ghose, 330, 331. **60.** If the owner of two or more properties make separate mortgages on them by separate assurances, each mortgage may, in the absence of a contract to the contrary, be dealt with irrespectively of the other, though the mortgages are made in favour of the same mortgagee.

Illustration.

A the owner of farm Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

Bill III, s. 23, cl. (c). Right of usufructuary mortgagor to recover possession. **61.** In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

(a) where the mortgagee is authorized to pay himself from the rents and profits of the property the principal money and interest thereof,—when such money and interest are paid ;

(b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in the Court as hereinafter provided.

Bill III, s. 25: 10 Bom., 369: 11 Bom., 32. Accession to mortgaged property. **62.** Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the cost of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the cost of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable in the case of an acquisition necessary to preserve the property from destruction, forfeiture, or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession, shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the cost of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set-off against interest, if any, payable on the money so expended.

Illustration.

A mortgages to B a field, the trees on which are the property of Government. B enters into possession of the field, and as occupant thereof buys the trees. A redeems the field. He is entitled to the trees on payment of their cost. 10 Bom., 389, 371: and see N.W.P., 1866, p. 281.

63. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, have the benefit of the new lease. Bill III, s. 26.

64. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee, Bill III, s. 24: N.W.P., 1867, p. 199.

(a) that the interest which the mortgagor assumes to transfer to the mortgagee subsists and that the mortgagor has power to transfer the same;

(b) that the mortgagor will defend, or, if the mortgagee be in possession, enable him to defend, the mortgagor's title to the mortgaged property; S. D. A., 1857, p. 1195: 1853, p. 575.

(c) that the mortgagor will pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, Effect of forfeiture of lease, N.W.P., 1869, p. 128.

performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagees against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

- (c) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

- Bill III, s. 27. **65.** A mortgagor in possession of the mortgaged property is not liable to the mortgagees for waste by mortgagor in possession, allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Lewin on Trusts, p. 268. *Explanation.*—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagees.

- Bill III, s. 30 : **66.** In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.
- 2 Mad., 289 :
N. - W. P.,
1870, p. 311 :
no foreclosure
before expiration
named, 2
Bom., 242 :
Mortgagee's
right to sale,
7 Bom. A. C.
J., 146 : 9
Bom., 12.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

- (a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or
- (b) to authorize a mortgagor who holds the mortgagee's rights as his trust or legal representative and who may sue for a sale of the property to institute a suit for foreclosure; or
- (c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property: unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Simple mortgage, N.-W. P., 1869, p. 184: Usufructuary, N.-W. P., 1876, p. 55: Fisher, 518, 575: Qy. as to conditional mortgages.

Cases *contra*, Macph., 195, 196.

Right to sue for mortgage-money.

67. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

- (a) where the mortgagor binds himself to repay the 6 W. R., 283.

SAME:

- (b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor:

Macph., 233: Act XXXIII of 1871, s. 46: 25 W. R., 7 (partial deprivation).

- (c) where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

4 Moo. I. A., 464: Marsh., 209: 7 S. D. A., 47: N.-W. P., 1860, p. 28: so in the case of a Kanam mortgage, 2 Mad., 315: 6 W. R., 283 (power to usufructuary mortgagee).

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-five, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

Bill III, s. 35: 68. A power conferred by the mortgage-deed on the
8 Bom. A. C. J., mortgagee, or on any person on his
142: Muham- behalf, to sell or concur in selling the
madan law, Power of sale mortgaged property, or any part thereof,
Macph., 2. when invalid.

is invalid, except where—

(a) the principal money originally secured is five hundred rupees or upwards; or

(b) the mortgagee is the Secretary of State for India in Council; or

(c) the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

Act No. XXVIII of 1866, section 6, is repealed so far as it is inconsistent with this section.

Bill III, s. 37: 69. If, after the date of the mortgage, any accession is
11 Bom., 32. made to the mortgaged property, the
Accession to mort- mortgagee, in the absence of a contract to
gaged property. the contrary, shall, for the purposes of
the security, be entitled to such accession.

Illustrations.

(a) *A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.*

(b) *A mortgages a certain plot of building-land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.*

Bill III, s. 38. 70. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a
Renewal of renewed lease. mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Bill III, s. 39. 71. When, during the continuance of the mortgage the mortgagee takes possession of the
Rights of mort- mortgaged property, he may spend such
gagee in pos- money as is necessary—
session.

Macph., 109,
113, 252: 1
Bom., 199, 203:
5 Bom. A. C.
J., 109, 116.

(a) for the due management of the property and the collection of the rents and profits thereof;

N.-W. P.,
1867, p. 187.

(b) for its preservation from destruction, forfeiture or sale;

1 W. R., 183.

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and

(e) when the mortgaged property is renewable lease- 11 Moo. I A.,
hold, for the renewal of the lease; 241.

and may, in the absence of a contract to the contrary, and such money to the principal money, at the rate of interest payable on the principal and where no such rate is fixed at the rate of nine per cent. per annum.

Where the property is by its nature insurable at ordi- 23 & 24 Vic.,
nary rates, the mortgagee may also, in the absence of a c. 145, s. 11 :
contract to the contrary, insure and keep insured against 2 Dav., 606.
loss or damage by fire the whole or any part of such prop-
erty, and add the premiums paid for any such insurance
to the principal money at the same rate of interest.

72. Where mortgaged property is sold through failure Bill III, s. 42 :
Charge on pro- to pay arrears of revenue or rent due in Macph., 113,
ceeds of revenue- respect thereof, the mortgagee has a 234 : 1 W. R.,
sale. charge on the surplus, if any, of the 270 : 16 W. R.,
222.

proceeds, after payment thereof of the said arrears, for the
amount remaining due on the mortgage, unless the sale has
been occasioned by some default on his part.

73. Any second or other subsequent mortgagee may, at Bill III, s. 43 :
any time after the amount due on the Report, ss. 31,
Right of subse- next prior mortgage has become payable, 33.
quent mortgagee to pay off prior
mortgagees, tender such amount to the next prior
mortgagee, and such mortgagee is bound

to accept such tender and to give a receipt for such amount;
and (subject to the provisions of the law for the time being
in force regulating the registration of documents) the sub-
sequent mortgagee shall, on obtaining such receipt, acquire,
in respect of the property, all the rights and powers of
the mortgagee, as such, to whom he has made such tender.

74. Every second or other subsequent mortgagee has, Bill III, s. 58.
Rights of mesne so far as regards redemption, foreclosure
mortgagee against and sale of the mortgaged property, the
prior and subse- same rights against the prior mortgagee
quent mortgagees. or mortgagees as his mortgagor has

against such prior mortgagee or mortgagees, and the same
rights against the subsequent mortgagees (if any) as he has
against his mortgagor.

75. When, during the continuance of Bill III, s. 39.
Liabilities of mortgagee in pos- the mortgage, the mortgagee takes pos-
session. session of the mortgaged property,—

(a) he must manage the property as a person of ordi- 2 Bom., 222 :
nary prudence would manage it if it were his Act IX of
own; 1872, s. 161 :
Fisher, s. 1530.

8 Ch. D., 427
N.-W.P., 1875,
p. 100.

2 Bom., 231.

Macph., 113,
119.

W. R., 488 :
4 Y. & C.
Appx., 507 :
Fisher, s. 1530.

Bill III, s. 41 :

Macph., 118,
119, citing 7
N.-W. P., 436 :
9 N.-W. P., 1 :
Act I of 1877,
s. 54.

2 Ben. P. C.,
55 : 5 W. R.,
53, 371, &c. :
Macph., 119.

5 Bom. A. C.
J., 196 : 12
Bom., 88 : 10
Ben., 336 : N.-
W. P., 1868, p.
182 ; ib., 1868,
p. 153 : when
he cultivates,
7 W. R., 244 :
R. B. Ghose,
262 : 2 Moo. I.
A. Ca., 1.

Macph., 159,
160.

(b) he must use his best endeavours to collect the rents and profits thereof ;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold ;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;

(e) he must not commit any act which is destructive or permanently injurious to the property ;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property ;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers which they are supported ;

(h) his receipt from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c), (d), and (e), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money. The surplus, if any, shall be paid to the mortgagor ;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross

receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Loss occasioned
by his default.

Bill III, s. 33,
last para.

76. Nothing in section seventy-five, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the

Receipts in lieu
of interest.

Bill III, s. 40 :
Sev. 333 : see
10 Moo. I. A. 340.

mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or of such interest and defined portions of the principal.

Priority.

77. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of
prior mortgagee.

Bill III, s. 44 :
Evidence Act,
s. 115 : N.-W.
P., 1868, p. 402 :
4 Mad., 378 :
2 Moo. I. A.,
487 : 11 W. R.,
286 : Hindu
mortgagee in
possession, 8
Bom. A. C.
J., 50, 55, in
Guzarat. 11
Bom.

78. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account expresses the maximum to be secured thereby, a subsequent mortgage on the same property shall, if made with notice of the prior mortgage, or if the instrument effecting the prior mortgage is registered, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Mortgage to
secure uncertain
amount when
maximum is ex-
pressed.

Bill III, s. 25 :
Report, s. 29.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000; and C gives notice thereof to B & Co. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account

against him exceed the sum of Rs. 10,000. *B & Co.* are entitled, to the extent of Rs. 10,000, to priority over *C*.

Bill III, s. 46: **79.** No mortgagee paying off a prior mortgage, whether
Report, s. 34: with or without notice of an interme-
2 Ben. App., Tacking abolished. diate mortgage, shall thereby acquire any
45: 5 Ben., 463: priority in respect of his original security. And, except in
11 W. R., 310. the case provided for by section seventy-eight, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Marshalling and Contribution.

Fisher, 704: **80.** If the owner of two properties mortgages them
Bill III, s. 47: both to one person and then mortgages
W. R., 1864, Marshalling securities. one of the properties to another person
p. 374: 1 W. who has not notice of the former mort-
R., 353: 7 W. gage, the second mortgagee is entitled to have the debt of
R., 483: 12 the first mortgagee satisfied out of the property not mort-
W. R., 114: gaged to the second mortgagee, so far as such property will
Macph., 205. extend; but not so as to prejudice the rights of the first mortgagee or of any other person having an incumbrance on either property.

Macph., 136.
Bill III, s. 48. **81.** Where several properties, whether of one or several
Fisher, 700. owners, are mortgaged to secure one
Contribution to mortgage-debt. debt, each property is liable to contri-
bute rateably to the debt secured by
the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where of two properties belonging to the same owner one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is liable to contribute rateably to the latter debt, after deducting the amount of the former debt from the value of the property out of which it has been paid.

Fisher, 701. Nothing in this section applies to a property liable under section eighty to the claim of the second mortgagee.

Deposit in Court.

Bill III, s. 23: **82.** At any time after the principal money has become
Ben. Reg. I of payable and before a suit for redemp-
1798, s. 2: tion of the mortgaged property is bar-
Macph., 171. Power to de. red, the mortgagor, or any other person
posit in Court entitled to institute such suit, may depo-
money due on sit, in any Court in which he might have instituted such
mortgage.

suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of complaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Bill III, s. 28 :
Ben. Reg. I
of 1798, s. 2 :
Macph., 171.

83. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section eighty-two the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Cessation of
interest.

Bill III, s. 32 :
9 N.-W. P., 1 :
Macph., 159,
160.

Suits for Foreclosure, Sale or Redemption.

84. Subject to the provisions of the Code of Civil Procedure, section four hundred and thirty-seven, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter, relating to such mortgage : provided that the plaintiff has notice of such interest.¹

Bill III, s. 49.

Parties to suits
for foreclosure,
sale and redemption.

Foreclosure and Sale.

85. In a suit for foreclosure, if the plaintiff succeed, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within

Bill III, s. 50.

Decree in foreclosure suit.

¹ 14 Moo. I. A., 101; 1 W. R., 176; 21 W. R., 428 : explained by Macph., 146; Seton, 1. 442, see Act X of 1877, sec. 82; 5 Bom. O. C. J., 76 (legal representative of deceased mortgagor); 8 Ben., 104 (purchaser from mortgagor); Marshall, 292, claimants of right of redemption, N.-W. P., 1868, p. 146.

six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

Bill III, s. 51.

86. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-three, the defendant shall (if necessary) be put into possession of the mortgaged property.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

W. R., 91.

Provided that the Court may, upon good cause shewn, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 129 for the words, "Final Decree," the words "Decree absolute" shall be substituted.

Bill III, s. 52.

87. In a suit for sale, if the plaintiff succeed, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-five, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that

the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeed, the Court may at his instance pass a like decree in lieu of a decree for foreclosure.

When the mortgagee sues only for foreclosure, and not for foreclosure or sale, if the Court consider that he will not be damaged by a sale, and if the defendant furnishes such security as the Court thinks sufficient for the full and prompt payment of the balance due for the time being by him on the mortgage, the Court may, at the instance of the defendant, pass a like decree.

88. If in any case under section eighty-seven the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-three, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-seven; and thereupon the defendant's right to redeem and the security shall both be extinguished.

89. When the nett proceeds of any such sale are sufficient to pay the amount due for the balance due on time being on the mortgage, the balance, mortgage, if legally recoverable from the defendant otherwise than out of the property sold, may be recovered either (if the Court thinks fit) in the same suit in the same manner as under a decree for money, or by any other legal process open to the mortgagee.

Redemption.

90. Besides the mortgagee, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property:—

(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property;

(b) any person having any interest in or charge upon the right to redeem the property;

8 W. R., 230;
6 W. R., 230,
&c.

But see 17 W.
R., 272.

- (c) any surety for the payment of the mortgage-debt or any part thereof ;
- (d) the guardian of the property of a minor mortgagor ;
- (e) the committee or other legal curator of a lunatic or idiot mortgagor ;
- (f) the judgment-creditor of the mortgagor, when he has obtained execution ;
- (g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Fisher, 763.

Bill III, s. 56:
see Code, C.
P., s. 461 :
N.-W. P.,
1870, p. 207.

Decree in redemp-
tion-suit.

91. In a suit for redemption, if the plaintiff succeed, the Court shall pass a decree—

ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree ; and

ordering that upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property ; but

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

Bill III, s. 57.

92. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-three the plaintiff shall if necessary, be put into possession of the mortgaged property.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to

In default, fore-
closure or sale.

redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

If he apply for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he apply for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished :

Provided that the Court may, upon good cause shewn, and upon such terms, if any, as it thinks fit, from time to time, postpone the day fixed under section ninety-one for payment of the amount due.

93. In finally adjusting the amount to be paid to a Bill III, s. 59.
mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

94. Where one of several mortgagors redeems the mort- Macph., 145.
gaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the costs properly incurred in so redeeming and obtaining possession.

Charge of one of several co-mortgagors who redeems.

Sale of Property subject to prior Mortgage

95. If any property the sale of which is directed under Bill III, s. 60 :
this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

Report, s. 25 altered : Act X of 1877. s. 295.

Bill III, s. 61 :
see Act X of
1877, s. 285.

Application of
proceeds.

96. Such proceeds shall be brought into Court and applied as follows :—

- first*, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;
- secondly*, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ;
- thirdly*, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;
- fourthly*, in payment of the principal money due on account of that mortgage ; and
- fifthly*, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there be more such persons than one, then two such persons according to their respective interests therein or upon their joint receipts.

Anomalous Mortgages.

Bill III, s. 62.
Bom. Reg.
V of 1827, s.
15. 'No precise
form is requir-
ed for a mort-
gage,' 5 Ben.,
272, per Touch,
(1. J.).

97. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Abandonment of Security.

98. Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches and brings to sale the mortgaged property, or the mortgagor's interest therein, he shall be deemed to have abandoned his security thereon, unless before the issue of the proclamation under the Code of Civil Procedure, section two hundred and eighty-seven, he gives notice of such security to the Court executing the decree.

Charges.

Bill III, s. 63.

99. Where immoveable property of one person is by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the

Abandonment of
security by mort-
gagee selling
mortgaged prop-
erty.

Charges.

property; and all the provisions hereinbefore applied to a mortgagor shall, so far as may be, apply to the owner of such property, and all the provisions hereinbefore applied to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

100. Where the owner of a charge or other incumbrance on immoveable property, is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

Bill III, s. 64:
Swinfen v. Swinfen, 29 Beav., 199:
Adams v. Angell, 5 Ch. D., 634, 645: 7 Mad., 231: 14 W. R., 491:
3 O'Kin., 184:
5 Ben., 463:
11 Bom., 41.

Notice and Tender.

101. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power of attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where no such person or agent can be found in the said district, or where the person on or to whom such notice or tender should be served or made is unknown to the person required or desiring to serve the notice or make the tender, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice or tender shall be served or made, and any notice served or tender made in compliance with such direction shall be deemed sufficient.

102. Where under the provisions of this chapter a notice is to be served on or by or tender or deposit made or accepted or taken out of Court by any person incompetent to contract, such notice may be served or tender or deposit made, accepted or taken by the legal curator of the property of such person, but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or tender or deposit made under the provisions of this chapter,

Notice, &c., to or by person incompetent to contract.

application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

103. A lease of immoveable property is a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

104. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the party giving it and tendered or delivered to the party who is intended to be bound by it, or affixed on a conspicuous part of the property.

Bill III, s. 63:
Report, s. 40:
5 Bom. A. C.
J., 179: 6 *ib.*,
31; 7 *ib.*, III:
and see 1 Ben.
F. B., 25: 13
W. R., 190: 1.
L. R., 2 Calc.,
146: 4 Bon.
Appx. 86:
12 Ben., 263:
N.-W. P.,
1878, p. 9:
Perry, 480.

Duration of cer-
tain leases in ab-
sence of written
contract or local
usage.

Notice to deter-
mine lease.

105. A lease of immoveable property from year to year,
 Leases how made. or for any term exceeding one year, or
 reserving a yearly rent, can be made
 only by a registered assurance.

All other leases of immoveable property may be made Bill III, s. 65.
 either by assurance or by oral agreement.

106. In the absence of a contract or local usage to the
 contrary, the lessor and the lessee of
 Right and li- immoveable property, as against one
 abilities of lessor and lessee. another, respectively, possess the rights
 and are subject to the liabilities mentioned in the rules
 next following, or such of them as are applicable to the
 property leased :—

A.—Rights and Liabilities of the Lessor.

- (a) the lessor is bound to disclose to the lessee any Bill III, s. 66 :
 defect in the property, with reference to its ^{6 W. R., 814.}
 intended use, of which the former is, and the
 latter is not, aware, and which the latter could
 not with ordinary care discover :
- (b) the lessor is bound on the lessee's request to put ^{6 Ben. Appx.,}
 him in possession of the property leased : ^{44 : 39 (3) : 15}
^{W. R., 230 :}
- (c) the lessor shall be deemed to contract with the ^{W. R., 121.}
 lessee that if the latter pays the rent reserved
 by the lease and performs the contracts binding
 on the lessee, he may hold the property leased
 during the time limited by the lease without
 interruption :
- (d) where an arrear of rent is due from any lessee, the ^{39 (2) altered :}
 lessor may, instead of suing for the arrear, re- ^{cf. IX of 1872,}
 cover he same by distress and sale of the goods ^{s. 93 : 11 W. R.,}
 found in or upon the property in respect of ^{278 : 12 W. R.,}
 which the arrear is due or of the produce of ^{149.}
 such property, but subject to the local law, if
 any, for the time being in force relating to
 distresses.

B.—Rights and Liabilities of the Lessee.

- (e) if during the continuance of the lease any accession ^{8 Ben., 73 :}
 is made to the property leased, such accession ^{5 Calc. L. R.,}
 (subject to the law relating to alluvion for the ^{33.}
 time being in force) shall be deemed to be com-
 prised in the lease :
- (f) if by fire, tempest or flood, or violence of an army
 or of a mob, or other irresistible force, any
 material part of the property leased be wholly

destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

provided that if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(g) if the lessor neglects to make, within a reasonable time after notice, repairs which he is bound to make to the property leased, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(h) if the lessor neglect to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property leased, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(i) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth ; provided he leaves the property leased in the state in which he received it :

*Re Thakoor
Ghander,
Pavamanick,
Ben. F. B.
Rulings, 595 :
8 Ben., 237 :
14 Ben., 201,
205 : Canadian
Code, s. 1640.*

*Of. Act XIX
of 1868, s. 46 :
Act XVIII of
1873, s. 42.*

(j) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property leased for the season current when the lease determines, and to free ingress and egress to reap and carry them :

*5 S. D. A., 205 :
5 Mad., 120,
227 : 7 Ben.,
152 : N.-W. P.,
1875, p. 181 :
12 W. R., 451 :
16 W. R., 112 :
6 S. D. A., 67 :
15 W. R., 449.*

(k) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property leased, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

*8 Ben., 239 :
12 Ben., 82.*

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under

the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

- (l) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which increases the value of such interest :
- (m) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf : See 23 W. R. 34.
- (n) the lessee is bound to keep, and on the termination of the lease to restore, the property leased in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter into the property leased and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :
- (o) if the lessee becomes aware of any proceeding to recover the property leased or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :
- (p) the lessee may use the property leased and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto : 5 Ben., 401, 416 : 8 Ben. Appx., 70 : 10 Ben. Appx., 41 : sed. v. 5 S. D. A., 205 : 15 W. R., 360 : 17 W. R., 416 : 23 W. R., 298 : W. R. Sp. (1884) 36 : 8 Ch. D., 526.
- (q) he must not, without the lessor's consent, erect on the property leased any permanent structure, except for agricultural purposes : 8 Ben., 242 : 14 & 15 Vic. c. 25, s. 3.
- (r) on the determination of the lease, the lessee is bound to put the lessor into possession of the property leased.

Bill III, s. 65,
cl. (a): 14 W.
R., 83: 24 W.
R., 68.

107. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee in the absence of a contract to the contrary shall possess

all the rights, and, if the lessee so elects, be subject to all the liabilities, of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Act XI of
1855, s. 1:
4 Anne, c. 16,
s. 10.

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that if the lessee pay rent to the lessor without having reason to believe that such transfer has been made, the lessee shall not be liable to pay such rent over again to the transferee:

Where only a part of the property leased is transferred by the lessor, he may (subject to the provisions of section thirty-eight) determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred.

Bill III, s. 60.

108. Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where

no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Bill III, s. 70:
7 W. R., 289.

3 Moo. I. A.,
281: 16 W.
R., 147.

Lease by
Hindu widow,
Marshall, 166.

Determination
of lease.

109. A lease of immovable property determines—

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event:

(c) where the interest of the lessor in the property leased terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interest of the lessee and the lessor in 3 O'Kin., 159 :
the whole of the property leased become vested But see per
Peacock, C.J.,
10 W. R., 16.
at the same time in one person in the same
right :

(e) by express surrender, that is to say, in case the Surrender of
lessee yields up his interest under the lease to right to re-
the lessor, by mutual agreement between them : deem mort-
gaged lease,
N. W. P.,
1869, p. 45 ;
by one of
several joint
lessees, 9 W.
R., 147.

(f) by implied surrender ;

(g) by forfeiture, that is to say, (1) in case the lessee Marshall, 250 :
breaks an express condition which provides that, 16 W. R., 103 :
on breach thereof, the lessor may re-enter, or the 25 W. R., 227.
lease shall become void ; or (2) in case the lessee
renounces his character as such by setting up a 18 W. R., 465 :
title, in a third person or by claiming title in but see 22
himself, and in either case the lessor or his trans- W. R., 448 :
feree does some act shewing his intention to 25 W. R., 147.
determine the lease :

(h) on the expiration of a notice to determine the lease, 23 W. R., 238,
or to quit, or of intention to quit, the property 271.
leased, duly given by one party to the other.

Illustration to clause (f.)

A, the lessee, accepts from the lessor a new lease of the property
leased, to take effect during the continuance of the existing lease.
This is an implied surrender of the former lease, and such lease
determines thereupon.

110. A forfeiture under section one hundred and nine, Bill III, s. 71 :

Waiver of for- clause (g), is waived by acceptance of W. R. F. B.,
feiture. rent which has become due since the 10 : Marshall,
25,
forfeiture, or by distress for such rent,

or by any other act on the part of the lessor shewing an
intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has
been incurred :

Provided also that, where rent is accepted after the insti- 2 Bom., 73.
tution of a suit to eject the lessee on the ground of for-
feiture, such acceptance is not a waiver.

111. A notice given under section one hundred and Bill III, s. 72.

Waiver of notice nine, clause (h), is waived, with the
to quit. express or implied consent of the person
to whom it is given, by any act on the

part of the person giving it shewing an intention to treat
the lease as subsisting.

Illustrations.

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

Bill III, s. 73,
N.-W.P., 1867,
Ex. o. c. j., l:
*Timmara Pu-
ranik v. Ba-
biyá Kuppa-
gondá*, 2 Bom.,
70: 8 W. R.,
225, per Pea-
cock, C. J.:
Act XVIII of
1873, s. 34, cl.
(c), para. 1.

112. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Bill III, s. 74:
10 W. R., 384;
13 W. R., 281:
N.-W.P., 1871,
p. 63.

113. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee on terms and conditions substan-

tially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to, and enforceable by, the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees.

Bill III, s. 75:
Report, s. 41:
3 Bom. A. C.
J., 27: 12
Ben., 263: N.-
W. P., 1870,
p. 204.

7 W. R., 152:
16 W. R., 185:
22 W. R., 394,
548: 23 W. R.,
271: 23 W. R.,
284.

114. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

Illustrations.

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C*

continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

115. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government may by notification in the official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force.

CHAPTER VI.

OF EXCHANGES.

116. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

Bill III, s. 76:
N. Y. Code, ss.
903, 906: 1
Mad., 100.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

117. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange by reason of any defect in the title of the other party is entitled at his option to compensation or to the return of the thing transferred by him.

Bill III, s. 77,
Code Civil,
Art. 1705.

118. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Bill III, s. 78.

119. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Bill III, s. 79.
1 Morl., 105.

CHAPTER VII.

OF GIFTS.

120. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

- Acceptance when to be made. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
- L. C., 1531. If the donee dies before acceptance, the gift is void.
- Act III of 1877, s. 17, cl. (a). **121.** For the purpose of making a gift of immoveable property, the transfer must be effected by registered assurance signed by or on behalf of the donor, and attested by at least two witnesses.
- Act X of 1865, s. 54. Such assurance shall not be considered as insufficiently attested by reason of any benefit thereby given to any person attesting it, or to his or her wife or husband; but the gift shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.
- For the purpose of making a gift of moveable property, the transfer may be effected either by a non-testamentary instrument registered and signed as aforesaid or by delivery.
- Act IX of 1872, s. 90. Such delivery may be made in the same way as goods sold may be delivered.
- Gifts of existing and future property. **122.** A gift comprising both existing and future property is void as to the latter.
- Burge II, 144. **123.** A gift of a divisible thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.
- Gift to several, of whom one does not accept.
- 124.** The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.
- When gift may be suspended or revoked.
- Canadian Code, s. 811. A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.
- Save as aforesaid, a gift cannot be revoked.
- Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

- (a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before

A. B dies without descendants in *A*'s lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B*'s assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to *A*.

125. If the donee or any person claiming under him is by reason of the invalidity of the donor's title deprived of the thing given, the donor is not responsible for loss caused thereby.

126. Where a gift is in the form of a single transfer to the same person of several things, which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if after becoming competent to contract he retains the property given, he becomes so bound.

Illustrations.

(a) *A* has shares in *X*, a prosperous joint stock company, and also shares in *Y*, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in *Y*. *A* gives *B* all his shares in joint stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

(b) *A* having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also a sum of money. *B* refuses to accept the lease. He does not by this refusal forfeit the money.

127. Subject to the provisions of section one hundred and twenty-six, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein :

128. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law.

Saving of donations *mortis causa* and Muhammadan law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

129. A claim is actionable when the civil Courts recognise it as a ground for relief, whether a suit for its enforcement is or is not actually pending or likely to become necessary.

Bill III, s. 80 :
Report, s. 99 :
38 & 37 Vic.,
c. 63, s. 25 (b) :
1 Mad., 150 :
see 5 W. R.,
230 : but see 10
N.-W. P., 474,
cited Macph.,
122.

130. No transfer of any debt, or any beneficial interest in moveable property, shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to such transfer ; and every dealing by such debtor or person, not being a party to, and not having received express notice of, a transfer with the debt or property shall be valid as against such transfer.

Illustrations.

(a) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, having no notice of the transfer, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(b) *A* has jewels deposited with *B*, a jeweller. *A* mortgages them to *C*. *A* then executes an instrument transferring them to *D*, who takes it to *B* and gets the jewels from him before he, *B*, has received any notice of *C*'s mortgage. *B* is justified in handing the jewels to *D*, and *C* has no remedy against *D*.

Bill III, s. 81 :
Report, s. 100.

131. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

Bill III, s. 82 :
Fisher, 116 :
Sichel v. Raphael, 10 Jur.
N. S., 1165.

132. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer, unless where the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

133. Where the transferor of a debt warrants the solvency of the debtor the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount of such consideration.

134. Where an actionable claim is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Discharge of person against whom claim is sold.

Warranty of solvency of debtor.

Debtor to give effect to transfer.

Nothing in the former part of this section applies—

- (a) where the sale is made to the co-heir or co-proprietor of the claim sold ;
- (b) where it is made to a creditor in payment of what is due to him ;
- (c) where it is made to the possessor of a property subject to the actionable claim ;
- (d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

135. No judge, pleader, clerk, bailiff or other officer

Incapacity of officers connected with Courts of justice.

connected with Courts of justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

136. The person to whom a debt or charge is trans- Bill III, s. 83 :

Liability of transferee of debt.

ferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date

Mangies v. Dixon, 3 H. L. Ca., 702 : *Fisher*, s. 1058.

of the transfer.

Illustration.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

137. Where a debt is transferred for the purpose of Bill III, s. 84 :

Mortgaged debt.

securing an existing or future debt, the original debt, if recovered by either the

transferor or transferee, is applicable, first, in payment of the costs of such recovery, secondly, in or towards satisfaction of the amount for the time being secured by the transfer ; and the residue, if any, belongs to the transferor.

Saving of negotiable instruments.

138. Save as provided by section one Bill III, s. 85.

hundred and thirty-seven, nothing in this chapter applies to negotiable instruments.

THE SCHEDULE.

(a). STATUTE.

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10.	Uses ...	The whole.
4 Wm. & Mary, c. 16.	Clandestine Mortgagees	The whole.

(b). ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
XXIX of 1842...	Lease and release ..	The whole.
XXXI of 1854...	Modes of conveying land	Section 17.
XI of 1855 ...	Mesne profits and improvements.	Section 1, an in the title and preamble, the words "to mesne profit and" and "to limit the liability for mesne profits and."
XXVII of 1866	Indian Trustee Act ...	Section 31.
IV of 1872 ...	Panjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876...	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief ..	In sections 35 and 36, the words "in writing."

THE SCHEDULE—(contd.)

(c). REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798.	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Mortgagees in possession	Section 15.

2.—THE TRANSFER OF PROPERTY BILL.

RECOGNIZING in this Bill, which was originally drawn by the late Law Commission and has since been repeatedly revised, the most important of the measures laid before us, we have devoted to it perhaps an undue share of the limited time at our command.

Although it has been objected to the Bill that it deals with subjects which at a later stage of the work of codification will have to be arranged under separate chapters, it has appeared to us convenient to retain for the present in a great measure the form in which it was originally drafted.

Dealing generally with the transfer of property, its arrangement enables the legislature to determine to what general principles the law of transfer should conform, and to apply such principles consistently.

Read with the Contract Act, this Bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer *inter vivos*, of interests in property ; and for the convenience of the practitioner it could hardly be enacted in a more accessible form.

This, it appears to us, justifies the introductory chapter, which, after declaring what rights are inalienable and by what persons transfers may be made, proceeds to declare restrictions of the transfer of property called for in the interests of society. These restrictions are identical with those which are already incorporated into the law of India in the Succession Act.

In considering the necessity for these provisions, it must not be forgotten that the number of domiciled Europeans and Eurasians holding property in India has of late years greatly increased, and that the value of the property held by them in plantations of tea and coffee, in mills and machinery and in other investments, now amounts to many millions of pounds sterling. These persons and their estates are subject to the law of succession (Act X of 1865), and it will be obviously inconsistent that they should possess powers of creating estates in their property by transfers *inter vivos* which the legislature has declared they should not enjoy by testamentary disposition. Moreover, where the declared law is silent on the subject in respect of transfers *inter vivos*, the Courts may, and probably would consider themselves, bound to, recognize principles stamped with the assent of the legislature as conclusive of the question that transfers *inter vivos* creating estates in violation of these principles are invalid as opposed to public policy.

The Privy Council has already ruled that estates cannot be created by Hindus in contravention of the principles which underlie the Thellusson Act, or subject to conditions which are void for repugnancy.

The rules contained in sections 10 to 35 impugn, so far as our experience goes, no law or practice of Hindus, Muhammadans or other sects recognized in India as enjoying special personal laws, unless it may be the now obsolete practice among Muhammadans of devoting property to the maintenance of the family of a particular saint. But to avoid any disturbance of rights enjoyed under personal laws, sufficient provision is made in the Bill.

The persons to whom the provisions we are now considering will in practice be found mainly applicable are property-holders who have been designated in former Acts as "persons to whom the English law applies," a phrase which gave rise to no little difficulty in the case of persons holding property in the mufassal. This class has now attained sufficient importance in numbers and wealth to demand at the hands of the legislature an explicit declaration of restrictions which may be imposed on their dealings with their property, and where these restrictions are founded on approved principles and not inconsistent with personal law, there is no reason why they should not be declared of general application.

The sections from 36 to 53 embody rules already applied in the Courts of India, or flowing naturally from accepted principles.

The rules relating to sales, mortgages, exchanges and gifts declare generally no more than is understood and applied as law in the Courts. The exceptions will be noticed in our detailed observations.

Chapter I: Preliminary.—We would expressly save, in section 2, transfers by decree or order of Courts of competent jurisdiction.

In the interpretation-clause (section 3) we would insert definitions of "ownership," and "property;" we would extend the definition of "attached to the earth" so as to include trees and shrubs; and with reference to sections 40, 56, 78, 79 and 80 of the Bill as we have revised it, we would define "notice" as follows :—

"A person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from inquiry which he ought to have made or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, section 229."

We would declare that all chapters and sections of the Bill which relate to contracts should be taken as part of the Contract Act, 1872. When the body of substantive civil law enacted for India is rearranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the legislature,¹ the

¹ This, we understand, is all that was intended by the Government of India in paragraph 18 of its Legislative despatch No. 84, dated 10th May, 1877, by the phrase "scientifically arranging the various chapters of the Civil Code thus produced," and some such rearrangement was contemplated by the late Indian Law Commissioners, who observe

chapters on Sale, Mortgage, Lease and Exchange, contained in the present Bill, will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons.

Chapter II: Of Transfers of Immoveable Property.—We think that chapter II should be extended to transfers of property, whether moveable or immoveable; that it should be entitled "*Of Transfers of Property by act of Parties*"; and that it should commence with two sections,—one defining "transfer," the other showing what may be transferred. The latter section should, we think, to some extent follow the analogy of the Code of Civil Procedure, section 266, clauses (e), (g), (h) and (k), as to property which may be attached.¹ We also think that this chapter should contain a section declaring that a transfer may be made without writing in every case in which a writing is not expressly required by law.

The Law Commissioners, by whom the original draft of this Bill was framed, observed that their chief object was to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the necessary complement of the work which they commenced in framing the law of Succession. With this view they inserted rules that conditions in restraint of alienation should be void; that conditions making an interest to cease on insolvency or attempted alienation should also be void; that restrictions should be placed on the power of tying up property by transactions *inter vivos*, similar to those imposed by the Indian Succession Act, sections 100 to 104, in the case of wills. They also proposed rules as to when certain interests created by transactions *inter vivos* should be deemed vested. And they applied *mutatis mutandis*, to transfers the rules of the Succession Act as to contingent bequests, conditional bequests and bequests with directions as to application and enjoyment. It seems to us that, subject to the following remarks, these rules are in themselves reasonable, and may properly be extended to the transactions *inter vivos* of all the inhabitants of India, whether they are or are not subject to the Succession Act. But as to the rule corresponding with section 100 of the Succession Act, Sir Charles Turner and Mr. West think that the law should be modified so as not to exclude the unborn beneficiary in the case supposed, but to make void any limitation beyond his interest. As to the rule

in their Sixth Report, referring to their rules relating to the transfer of property: "It is probable that several of these rules will eventually find a different place whenever a final distribution and rearrangement of the whole law shall have been effected; but some blending of subjects is unavoidable in a work which the Government has, for sufficient reasons, instructed us to submit to it in portions, as each portion is completed."

¹ In view of the more general prohibition that no transfer can be made which is opposed to the nature of the interest affected thereby, Sir Charles Turner thinks it unnecessary to declare that "a strictly personal right, &c., cannot be transferred."

corresponding with section 102 of the Succession Act, they think that, where distinct interests are given to persons as members of a class, which interests are ascertainable within the term prescribed by the rule against perpetuity, those interests should not fail by reason of other interests failing through the operation of that rule; and as to the rule corresponding with section 103 of the Succession Act, they think that, where an intermediate interests fails, the subsequent interest should not fail, if it is ascertained and vested immediately on the death of the specified persons who were living at the time of the transferor's death. Mr. Stokes is averse to making any of the modifications thus suggested. As to the rule prohibiting accumulation, we all should prefer the more liberal enactments of the Thellusson Act (39 & 40 Geo. III, c. 98), which allow an accumulation for twenty-one years, and do not effect provisions for payment of debts or for raising portions.¹ But as the rule embodied in the Succession Act, section 104, has now been in force for fourteen years, Mr. Stokes and Mr. West do not press its alteration. The Law Commissioners also proposed to extend to transactions *inter vivos* the rules as to election contained in Part XXVII of the Succession Act. We think that these rules also, founded as they are on principles of equity which are universally applicable, may also properly be inserted in the Bill.

We think provision should be made for the satisfaction of a right arising in favour of several persons, where, in consequence of a transfer, property is divided, and held in several shares; and we have framed a section with this object. Mr. West is of opinion that a corresponding rule is necessary for the case of a division of the property burdened with an obligation, and that the rules should apply in all cases of legal division.

Section 7 of the Bill treats of the title which the transferor of immoveable property can confer, and of the protection given to innocent transferees for value. We think that this matter should be dealt with in more detail, and have accordingly framed sections in substitution, providing for each of the following five cases:—

(1) where there is a transfer for consideration by a person, such as a Hindu widow, authorized only under circumstances in their nature variable to dispose of immoveable property;

(2) where a third person has a right to receive maintenance from the profits of immoveable property and such right does not amount to a charge;

(3) where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another, a right to restrain the enjoyment of the latter property;

¹ Sir Charles Turner would also urge that these enactments are frequently required by the circumstances of large zemindari properties.

(4) where a third person is entitled to the benefit of an obligation arising out of a contract and annexed to the ownership of immoveable property, but not amounting to an interest or easement ; and

(5) where a person holds immoveable property as its ostensible owner with the consent of the other persons interested therein.

We recommend, too, that the Bill should here provide for the following cases :—

- (a) where a person, erroneously representing that he is authorized to transfer certain immoveable property, assumes to transfer it for consideration and afterwards acquires an interest therein ;
- (b) where a transfer of immoveable property is made for consideration by persons having distinct interests therein ;
- (c) where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors ;
- (d) where a person creates, by transfer at different times, rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together. Mr. West thinks that the rule dealing with this case should be supplemented by a rule providing for the satisfaction of each later created interest to the fullest extent compatible with the rule of priority and for such adjustments as may further this object.

It seems to us that a clause resembling Act XI of 1855, section 2, which provides, in cases to which the English law is applicable, for improvements of immoveable property made by *bona fide* transferees who are subsequently evicted, may fitly be introduced into the Bill and applied to all persons in British India. We think, too, that such transferees should be allowed to remove growing crops which they have planted or sown on the property.

We think that the section (10) relating to transfers of land *pendente lite* should not forbid such transfers when made under the authority of the Court and on such terms as it may impose, and that the section (10A) relating to fraudulent transfers may properly be extended to cases of fraudulent forfeitures and to cases where the persons defrauded are co-owners or creditors.

Chapter III: Of Sales of Immoveable Property.—We think that “sale” should be defined as a transfer of ownership in exchange for a price paid or promised, or part-paid and part-promised. We entirely agree with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer. But we must remember that, in the absence of a much larger number of registration-offices that at present exist in India, the requirement of registration in the case of every petty transaction relating to land

would be an intolerable hardship. We have in this matter been guided by the analogy of the Indian Registration Act (III of 1877, section 17), and required that sale should be made in the case of immoveable property of the value of Rs. 100 and upwards only, by a registered assurance, but that, in the case of immoveable property of a less value, it may be made either by registered assurance or by delivery of the property. As to delivery, we think it will be enough to say that it takes place, in the case of a reversion or other intangible thing, when the parties consent to the delivery : and in the case of other immoveable property, when the seller places the buyer, or such person as he directs, in possession of the property.

The rights and liabilities of the seller and buyer may, we think, be conveniently classified as follows :—(a) duties of seller ; (b) rights of seller ; (c) duties of buyer ; (d) rights of buyer, and according to that phase in each case which is the more prominent in practice. In addition to the duties which the Bill (section 12) imposes on the seller, and which are generally recognised by the Courts we think that, when the property is, or forms part of, a revenue-paying estate, he should be bound to present an application to the proper officer for the requisite alteration of the revenue-register ;¹ that between the date of the contract of sale and the delivery of the property, he should take due care of the property and the title-deeds in his possession ; that, on being so required, he should give the buyer, or such person as he directs, such possession of the property as its nature admits, and that he should pay all public charges and rent accrued due in respect of the property up to the date of sale. As to his duty regarding incumbrances on the property sold, we conceive that it will be in accordance with what is generally understood to be the law throughout India merely to require the seller, in the absence of a contract to the contrary, to pay the interest due on the date of sale, and, where the property is sold free from incumbrances, to discharge all incumbrances thereon then existing. As to the implied contracts of a seller, we think it will be enough to provide that he shall be deemed to contract that the interest which he assumes to transfer to the buyer subsists, and that he has power to transfer the same ; provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract to the like effect so far only as his knowledge extends.

As to the buyer's duties, we would require him, in addition to the duties expressly imposed by the Bill (sections 12, 15, 16), to pay or tender, at the time and place of completing the transfer, the purchase-money to the seller or such person as he directs. Power to retain out of the purchase-money the amount of the incumbrances should, we think, be given to the buyer only when the property is sold free of incumbrances. We would expressly require the buyer to re-transfer the property when the ownership thereof has passed to him before

¹ In practice (according to Sir Charles Turner) the consideration-money is hardly ever fully paid until the seller has presented such an application.

payment of the purchase-money, and he fails to pay or tender it. We also think that, where the ownership of the property has passed to the buyer, he should, as between himself and the seller, be expressly bound to pay all public charges which may become due in respect of the property, the principal-money due on the incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

Chapter IV: Mortgages of Immoveable Property and Charges.—The objection raised by one eminent critic, that this chapter deals "with matters which do not transfer property, but only create a charge upon it" is one which seems to us to rest on an assumption that a transfer must of necessity extend to the whole property or interest of the transferor in the subject-matter of the transaction. We, considering ownership as generally divisible, have regarded the term "transfer" as properly applicable to any interest carved out of the aggregate called "ownership." This is consistent with the English law. "A security," says Mr. Fisher in his work on Mortgages, "is a redeemable estate or right which one person has in the property of another."

We think that the definitions of the four chief kinds of mortgage with which this chapter commences, and which were taken from Mr. Macpherson's well-known work, require some modification to adapt them to the various parts of India. Mr. West is of opinion that the words 'without delivering possession' in the definition of 'mortgage by conditional sale' are not essential, and are opposed to a common practice in the Bombay Presidency. Sir Charles Turner considers that transfer of possession is not of the essence of such mortgages, although they are very generally combined with transfer of possession and usufructuary provisions.

We are of opinion that writing and registration should be compulsory whenever the principal-money secured is one hundred rupees and upwards: when the principal is less than that sum and the property is not delivered, we would also require registration; and in all such cases we think the mortgagor, on payment of the amount remaining due, should be entitled to require the mortgagee to register an acknowledgment that any right in derogation of the interest transferred to him has been extinguished. The requirement of registration will not only discourage fraud and facilitate investigations of title, it will also preclude some difficult questions as to priority.

Mr. West would introduce a provision in the section treating of the right to redeem, to the effect that, if the time fixed for repayment of the mortgage-money has been allowed to pass, or if no time has been fixed, the mortgagee should be entitled to reasonable notice before payment. Mr. Stokes and Sir C. Turner are opposed to this provision as unsuited to India. In mortgages for considerable sums the parties would sufficiently protect themselves: in the far more numerous cases of mortgages for small sums to *saukára*, it would be inconvenient to require notice.

We think that a person interested in a share only of the mortgaged property should be entitled to redeem his own share only where the mortgagee, or, if there are several mortgagees, all of them, has or have acquired a share in the right to redeem.

The section (61) of the revised draft, declaring the right of an usufructuary mortgagor to recover possession, should, in Sir Charles Turner's opinion, enable him to do so—

where the profits are to be applied in payment of interest at a rate agreed or prescribed by law and then in reduction of principal—when the mortgagor pays or tenders to the mortgagee, or deposits in Court as hereinafter provided, the sum then due thereon ;

where the profits are to be taken in lieu of interest and no time is specified for redemption ; or where the profits are to be so taken and the mortgage is made for a term of years, but it was not the intention of the parties that redemption should be postponed to the expiry of the term—when the sum then due on the mortgage is paid, tendered or deposited as aforesaid ;

where the profits are to be taken in lieu of interest and the mortgage is made for a term, and it was the intention of the parties that redemption should not be allowed before the expiry of the term—when, after the expiry of the term, the sum then due on the mortgage is paid, tendered or deposited as aforesaid.

Explanation.—It is not necessarily to be concluded from the circumstance that a mortgage is expressed to be made for a term of years that it was the intention of the parties that redemption should not be allowed before the expiry of the term. The contrary intention may be declared by, or inferred from, other stipulations of the contract.

The case where accessions to mortgaged property have been acquired at the cost of the mortgagee should, we think, be provided for.

As the law stands, there is no implied contract on the part of the borrower to produce a security of any particular degree of safety, or any particular title, as in the case of a contract for sale. The implied contracts of the mortgagor should, therefore, in our opinion, be that the interest which he assumes to transfer subsists, and that he has power to transfer the same ; that the mortgagor will defend, or, if the mortgagee is in possession, enable him to defend, the mortgagor's title to the mortgaged property ; that where the mortgage is a second or subsequent incumbrance, the mortgagor will pay the interest accruing due on each prior incumbrance, and at the proper time discharge the principal due thereon. There should also be, in the case of mortgaged leasehold, the stipulations specified in the Bill (section 24) as to payment of rent, performance of conditions, observance of contracts and indemnity.

For the section (27) treating of waste by a mortgagor in possession, Mr. West would substitute the following : " A mortgagor must not by any act or wilful omission destroy, or materially impair the value of, the mortgaged property or his interest therein as a security for the mortgage-money."

We recommend the omission of the section (28) requiring certain notices to be given by mortgagors making, or proposing to make, second

and other subsequent mortgages. This provision (which was inserted by the Select Committee to which the Bill was referred) is a novelty, and does not seem to us likely to be of any practical use.

Section 34, expressing the present rule in the case of a mortgage by conditional sale, treats the mortgagee as having no remedy against the mortgagor personally, except in certain specified cases. Mr. West would substitute the following: "A mortgagee may sue a mortgagor for mortgage-money which has become payable in all cases except those wherein a personal liability has been excluded by express contract or by the nature of the mortgage."

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient, the mortgagee should, we think, be entitled to require the mortgagor to give him within a reasonable time another sufficient security for his debt, and if the mortgagor fails to do so, to sue him for the mortgage-money.

We think that a mortgagee interested in part only of the mortgage-money should not be precluded from suing for a partial foreclosure where the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

We would modify section 35 so as to allow powers of sale in all cases where the principal-money originally secured is five hundred rupees or upwards. They save litigation and expense. Their validity has been recognised in many parts of India. Moreover, interference with freedom of contract is *prima facie* undesirable, and it is, in our opinion, only in small transactions, where the mortgagor is generally poor and ignorant, that any real danger exists as to the misuse of such powers. In some cases the mortgagor obtains money on easier terms by conferring a power of sale on the mortgagee, and the power is usually, and not unreasonably, inserted in mortgages to agents of indigo, coffee and similar estates, where the value of the security might be considerably impaired, were the property neglected while the mortgagee was seeking a sale by order of Court.

Where the receipts from the mortgaged property are to be taken in lieu of interest, or of interest and defined portions of the principal, we do not think that a mortgagee in possession should be bound to collect the rents and profits and to repair.

The section (45) relating to mortgages made to secure the balance of a running account and expressing the maximum secured should, we think, be extended to mortgages to secure future advances and the performance of engagements.

We think that the Court should not postpone the day appointed for payment in a foreclosure-suit unless sufficient security is given as well as good cause shown, and we would modify section 50 so as to enable it to require such security.

The power conferred on a Court to order, in a foreclosure-suit, a sale in lieu of foreclosure, at the instance of the mortgagee, or at the

instance of the mortgagor furnishing security for any balance which may remain unsatisfied by the proceeds of the sale, will be novel throughout the greater part of the Mufassal.¹ But it seems to us expedient for the mortgagor that the Court should possess this power, and that where the sale takes place at the instance of the mortgages, he should not be allowed to recover any balance which he could not have recovered in the event of foreclosure, and that where the sale takes place at this instance of the mortgagor, the mortgagee obtains all that he is entitled to, if he receives his principal-money and interest.

Where a decree has been made for redemption, if the amount due is not paid on the day fixed by the Court, the plaintiff, where the mortgage is simple or usufructuary, should not be foreclosed, nor, where the mortgage is by conditional sale, should the property be sold.

Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, we think that he should be declared entitled to a charge on the share of each of the other co-mortgagors in the property, for his proportion of the costs properly incurred in so redeeming and obtaining possession. A decision of the late Sadr Court, North-Western Provinces, is to this effect. The High Court of Bombay also has ruled that the purchaser of the interest of one of several co-sharers in an equity of redemption may redeem the whole property and hold it subject to the rights on contribution of the other co-sharers.

The Bill should, Mr. Stokes and Sir Charles Turner think, provide separately for the rights and liabilities which arise where two or more forms of mortgage are combined.

Mr. Stokes would insert the following :—

“97. Where a simple mortgagee is, under the contract of mortgage, entitled as lessee or otherwise to receive the rents and profits accruing from the mortgaged property, such rents and profits shall, in the absence of a contract to the contrary, be credited to the mortgagor against the interest of the principal-money, and if they exceed the amount due in respect of interest, against the principal-money also. In other respects the rights and liabilities of the parties are the same as if the mortgage were purely simple.

Where a mortgagee by conditional sale is, under the contract of mortgage, entitled as lessee or otherwise to receive the rents and profits accruing from the mortgaged property, the rights and liabilities of the parties are, up to the date on which the principal-money has become payable, the same as if the mortgage were purely usufructuary, and from and after that date the same as if the mortgage were purely by conditional sale.”

Sir Charles Turner thinks that it would be enough to insert a simple declaration that the mortgagee and mortgagor have respectively the same rights and liabilities as are declared to be created in each of the several forms so combined, so far as such rights and liabilities are consistent with the mortgagee's availing himself of any of his remedies.

¹ But see, as to the Presidency of Bombay, Bombay Regulation V of 1827, *ad finem*.

Mr. West thinks that the general provisions of the Bill sufficiently cover this matter.

There is a common practice on the part of mortgagees of suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property. This is purchased by strangers to the mortgage, who are thus virtually defrauded by an enforcement of the security, of the existence of which they were wholly ignorant. In order to check this practice, we have framed a section providing that, where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches and brings to sale the mortgaged property, or the mortgagor's interest therein, his security shall be extinguished unless before the issue of the proclamation under the Civil Procedure Code, section 287, he gives notice thereof to the Court executing the decree.

We concur with the late Law Commissioners in thinking that mortgage by deposit of title-deeds should not be recognized. It is now hardly known in the Mufassal. It is opposed to the policy of our registration-law : it leads to evasions of the stamp-duty ; and it is at variance with the principle of making the system of transfer of immoveable property as far as possible a system of public transfer. When the amount secured is Rs. 100 or upwards, it would also be inconsistent with our proposed rule requiring a written instrument.

The section (64) relating to the merger of charges is, in the opinion of Mr. Stokes and Sir C. Turner, in exact accordance with the English and Indian decisions on the subject. Mr. West would substitute the following : "The holder of one of two or more incumbrances may purchase another, or the property subject thereto, and hold the same with his original incumbrance as separate interests."

For section 54 (as to the right to recover a balance due on a mortgage) Sir Charles Turner would substitute the following :—

"Where the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, together with the costs, if any, awarded to the mortgagee by the decree or in execution thereof, he may recover such balance and costs—

if the sale has been made in a suit for foreclosure, under the last paragraph of section 87, in execution of the decree, by enforcing the security ; and if such security is a bond, with sureties, both against such sureties and the principal :

in any case, if under the contract the mortgagee was entitled to any other remedy for the recovery of the mortgage-debt in addition to a sale of the property sold, and such other remedy has been claimed and decreed in execution of the decree ; but

if such other remedy has not been claimed and decreed, then by subsequent suit, unless he has by release or abandonment or otherwise lost such other remedy, or the suit is barred by limitation."

Lastly, we all think that the Bill should contain provisions as to serving notices, and making or accepting tenders and deposits, under this chapter, when the person concerned is non-resident, or unknown, or incompetent to contract. These provisions (which will be found in the

revised Bill, sections 101, 102) are novel ; but they are suggested by difficulties which have occurred in practice. Mr. West is of opinion that the following principles should be explicitly set forth : (1) a transaction in any guise, the real intent of which is to make property a security for a continuing debt, is to be deemed a mortgage ; (2) an unreasonable restriction on redemption is void ; (3) time specified is not of the essence of the transaction for either party. Mr. Stokes and Sir Charles Turner consider that it may be left to the Courts to determine in each instance what is the nature of a transaction, and whether time is of its essence, and that it would be inexpedient to do more, in respect of restrictions on redemption, than to give effect to the intention of the parties when it can be collected from the contract.

Chapter V: Of Leases of Immoveable Property.—A high authority objects to this chapter in that it deals "with matters which do not transfer property, but only create a limited interest in it." This is not, we venture to think, in accordance with either English or Indian law. The lessor not only creates, but conveys, an interest in the property concerned. We conceive, and have defined, a lease to be a transfer of a right to enjoy specified immoveable property, made in consideration of a premium or a rent. Such a right is "property," and the present chapter, therefore, in our opinion, rightly falls within the scope of a Bill entitled "The Transfer of Property Act."

We would require all leases from year to year, or for any term exceeding one year, or reserving a yearly rent, to be made by registered assurance. This agrees with the rule in the Registration Act (III of 1877), section 17, save that it omits the power given by that Act to the Local Government to exempt leases for terms not exceeding five years and for annual rents not exceeding fifty rupees. It is hardly necessary to point out that it also carries out the policy above referred to, of rendering the system of transferring immoveable property as far as possible a system of public transfer.

As to the respective rights and liabilities of the lessor and lessee, we would expressly recognize the right to distrain, subject to the local law relating to distresses. We think that the lessor's implied contract for quiet enjoyment should not in India be limited to the acts of the lessor or his transferees, or any person claiming through him or them. Where any material part of the property leased is by *vis major* destroyed or rendered substantially and permanently unfit for the purpose for which it was let, we recommend that the lessee should have the option of treating the lease as void. The lessee should, we think, in the absence of a contract or local usage to the contrary, be bound to make good only such defects as have been caused by his own act or default.

As to the effect of a surrender on an under-lease, we think that when the under-lease has been granted on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease, the under-lease should not be prejudiced. Mr. West thinks that the original lessor ought to be guarded against loss through

sub-leases at reduced rents, and that sub-lessees willing to make good terms of the original lease should be guarded against loss by any wilful forfeiture.

Mr. West would extend the section (73) relating to relief against forfeiture for non-payment of rent to all cases free from fraud and wilful neglect and reparable by damages.

Local legislation as to the relations of zemindar and raiyat being so copious and elaborate, we think that the provisions of this chapter should not apply to leases for agricultural purposes, except in so far as the Local Government may declare all or any of such provisions to be so applicable, together with, or subject to, those of any local law for the time being in force.

Chapter VI: Of Exchanges.—This chapter will supply a distinct defect in the Contract Act. We would define "Exchange," not as an agreement, but as the fulfilment of an agreement by mutual transfer of dominion, and accordingly make the first section of this chapter run thus:—

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an 'exchange.'

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale."

The effect of this will be to render a registered assurance necessary in the case of an exchange of land worth one hundred rupees or upwards. Here, again, we have borne in mind the expediency of rendering the system of transfer of immoveable property as far as possible a system of public transfer.

We think the clause (section 77) relating to the right of a party evicted from a thing received in exchange should be made subject to a contract to the contrary.

In accordance with the suggestion of a distinguished Native lawyer, Srīnivāsa Rao, we recommend the insertion here of a chapter on Gift *inter vivos*, saving of course the rules of Muhammadan law on this subject. We have framed some sections on this subject which will be found in chapter VII of the revised draft of the Transfer of Property Bill annexed to this report. They define "gift": they show how a transfer must be effected for the purpose of making a gift (a) of immoveable property, and (b) of moveable property: they require registration in the case of gifts of immoveable property of whatever value (Act III of 1877, section 17, clause a), and in the case of gifts of moveables, whenever the property given is not delivered: they provide a rule as to the effect of giving benefits to the persons attesting gifts of land: they declare that a gift comprising both existing and future property is void as to the latter, and that a gift of a divisible thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted it. They show when a gift may be suspended or revoked. They exempt the donor

from warranty. They deal, finally, with onerous and with universal gifts. Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud section 53 of the revised Bill would provide when the property is land. But an universal gift may conceivably be honest and comprise moveable property. It should therefore, we think, be specially provided for.

Of these provisions it may be said, generally, that some have not hitherto been declared by the legislature or the Courts; but they proceed on principles already recognized. The rule declaring an universal donee liable personally for the donor's debts due at the time of the gift to the extent of the property given is not only obviously equitable but is, as we have said, required to meet a not uncommon fraud. It is also in conformity with Hindu law.

Chapter VII: Of Transfers of Debts.—We think that this chapter should be entitled "Of Transfers of Actionable Claims," and that its provisions as to charges on debts and beneficial interests in moveable property should be omitted. We would provide rules as to the application and extent of the warranty of the solvency of a debtor. We think that in India it would be expedient to declare that, as a rule, when an actionable claim is sold, he against whom it is claimed is discharged by paying the buyer the price and incidental expenses of the sale with interest from the date of payment. Lastly, we think that no judge, pleader or other officer connected with Courts of justice should be capable of buying any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

We have inserted in the repealing schedule the Statute of Uses (27 Hen. VIII, c. 10). It has no operation in the Mufassal; and in the Presidency-towns it will be inconsistent with the provisions of section 8 of the Bill as now revised.

We annex to this Report a copy (marked A) of the Bill as we have revised it. [Printed *ante*.]

APPENDIX III.

GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

THE following third (final) Report of a Select Committee, together with the Bill as settled by them, was presented to the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 11th March, 1881 :—

We, the undersigned Members of the Select Committee to which the Bill to define and amend the law relating to the Transfer of Property was referred, have the honour to state that the Report of the Indian Law Commissioners', 1879, was duly communicated to us. We have carefully considered so much of it as relates to that Bill, as well as the papers specified in the annexed list, and, in compliance with the wish of the Secretary of State for India, as expressed in his despatch (Legislative) No. 37, dated 7th October 1880, we have now the honour to present this our third report.

We agree generally in the enlargement of the Bill effected by the Law Commissioners, and we shall in this report refer to the Bill as settled by them, and published in the *Gazette of India* for the 17th and 24th January 1880.

CHAPTER I.

PRELIMINARY.

WE have rendered the definition of "attached to the earth" inapplicable to objects which merely rest upon the earth. And we have amended the definition of "Notice" by making it apply expressly to a case where a person wilfully abstains from a search in a register which he ought to have made.

CHAPTER II.

TRANSFER OF PROPERTY BY ACT OF PARTIES.

THIS Chapter, after declaring what rights are inalienable, and by what persons transfers may be made, proceeds to declare restrictions of the transfer of property called for in the interests of society. These restrictions are in substance identical with those contained in the Indian Succession Act, and rights and liabilities arising out of customs or personal laws are sufficiently saved by section 2, clause (a).

We have amended section 6 (as to what may be transferred) in these respects :—*First*, we have in the first clause substituted “Act” for “section.” The effect will be to place Hindus on the same footing as Europeans as regards the power to make settlements, on marriage or otherwise, on persons not in existence at the date of the transfer. Although, no doubt, it has been laid down that the general principle of the Hindu Law is that donee must be in existence at the time of the gift, such settlements are in accordance with native usage.

Secondly, we have redrawn clause (a) thus :—“(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of the same nature, cannot be transferred : the chance of a Hindu heir succeeding to property in the possession of a Hindu female cannot be transferred to any one except the present or future owner or co-owner of the property affected thereby.”

Thirdly, we have made clause (c) run thus :—“(c) An easement cannot be transferred apart from the dominant heritage.”

Fourthly, we have extended clause (e) to rights to sue for harm illegally caused to property. We think that the power to transfer property to or for the benefit of women, so that they shall not be able, during their marriage, to transfer or charge the same should be confined, as it is now, to women not being Hindus, Mohamadans or Budhists, and we have altered section 10 accordingly.

It cannot be denied that one school of Mohamadan law does, as stated in the books (Baillie, p 571), permit a settlement on a person, his children and their offspring in perpetuity. But in practice this form of settlement is obsolete, and, if made, the Courts would now refuse to recognise it as valid. We think, therefore, that section 14, which prohibits this kind of perpetuity, may stand unaltered.

We have shortened and simplified the sections (33, 34) which deal respectively with conditions that a transferee shall perform an act at or before a specified time, and like conditions wherein no such time is specified.

We do not think that the proposition laid down in sections 40, as to a Hindu's right to receive maintenance from the profits of immoveable property, can be said to be authoritatively settled, and there are good grounds for questioning it.

We have therefore redrawn the first clause of section 40 thus :—

“40. Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred with the intention of defeating the right, such right may be enforced against a transferee with notice of such intention or a gratuitous transferee of the property affected by the right but not against a transferee for consideration and without notice of the right, nor against such property in his hands” The remainder of section 40, though suggested by English cases, is, in our opinion,

founded on general principles of equity applicable to India, and may, therefore, fitly be left unaltered in the Bill.

Section 41 has been amended so as to bring a benamidar clearly within its operation.

We have confined section 42 to cases of transfer for consideration by persons having authority to revoke the transfer.

To the section (44) dealing with transfer by one co-owner we have added a clause declaring that, when the transferee of a share of a dwelling-house belonging to an undivided family is a stranger, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

We have confined section 53 to cases of fraudulent transfer. To provide, as it now does, for fraudulent forfeitures would involve a change in the law, the consequences of which cannot easily be foreseen.

CHAPTER III.

SALES OF IMMOVEABLE PROPERTY.

We agree with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer, and we are inclined to go a little further in this direction than seemed good to the Law Commissioners. Thus, we think that in the case of a reversion or other intangible thing, though its value may be less than Rs. 100, the transfer should be made only by registered assurance, and we have altered section 54 accordingly.

As to the duties of the seller, we think that, except where the property is sold, subject to incumbrances, he should be bound to discharge all incumbrances on the property existing at the date of the sale; that he should not be bound to deliver the title-deeds till the whole of the purchase-money has been paid. We also think that the Bill may reasonably declare, as it does, that, in the absence of a stipulation to the contrary, the seller shall be deemed to contract that the interest which he assumes to transfer subsists, and that he has power to make the transfer. But where he sells, in a fiduciary character, we would follow the present practice, and declare simply that he shall be deemed to contract, that he has done no act whereby the property is incumbered, or he is hindered from transferring it. We have altered section 55, clauses (a), (7), (8), (9), accordingly.

The proposition laid down in clause (c) (1), that a purchaser is bound to disclose any fact unknown to the vendor which increases his interest in the property, *e.g.*, the actual or imminent death of a prior life tenant, has been questioned by a high authority. It appears to us in exact accordance with the rule laid down in *Turner v. Harvey*, Jac. 169; *Ellard v. Lord Leandaff*, 1 Ball & B., 241; and (on the sale of a life-policy) *Jones v. Keene*, 2 Moo. & R., 348. We have, however, made verbal amendment in this clause.

As to the duties of the buyer, we have struck out the clause requiring him to retransfer the property sold, where the ownership has passed before payment of the purchase-money and he fails to pay or tender it. In such case the seller's lien is, we think, sufficient.

As to the buyer's rights, we think that his lien as against the seller for purchase-money paid in anticipation should be available against all persons claiming under the seller with notice of the payment, we have altered the section accordingly.

Where two properties are subject to a common charge and one is sold the buyer's right as against the seller to have the charge satisfied out of the other property does not depend on whether or not the buyer had notice of the charge. We have, therefore, struck out of section 56, the words relating to notice.

CHAPTER IV.

MORTGAGES.

We think that in the definition of simple mortgage the expression "makes it a collateral security" is likely to give rise to difficulties. We also think that a transaction may be a "mortgage by conditional sale" although accompanied by possession, and in the definition usufructuary mortgage the words "or agrees to deliver" and "actual" seem unnecessary. We have therefore amended these definitions as follows :—

Simple Mortgage.

"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of what may be due to him on the mortgage, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee."

Mortgage by conditional sale.

"Where the mortgagor ostensibly sells the mortgaged property on condition that in default of payment of the mortgage-money on a certain date the sale shall become absolute, or

"on condition that on such payment being made, the sale shall become void, or

on condition that on such payment being made, the buyer shall retransfer the property to the seller.

"The transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale."

Usufructuary Mortgage.

"Where the mortgagor delivers possession of the property to the mortgagee and authorises him to retain such possession until payment

of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lien of interest or in payment of the mortgage-money, the transaction is called an usufructuary mortgage, and the mortgagee an usufructuary mortgagee."

We agree with the Law Commissioners that the requirement of registration will not only discourage fraud and facilitate investigations of title, but that it will also preclude some difficult question of priority. A majority of us, however, think that, where the principal-money secured is less than Rs. 100, the assurance need not be registered. And we have altered the Bill accordingly. Our colleague Mr. Stokes dissents from this alteration, as, in his opinion, all incumbrances should appear on the register: those who mortgage their property for small amounts, as a rule, require protection from fraud more than those who mortgage for large amounts, and the changes impending in the working of the Law will deprive the requirement of registration of all hardship even in the pettiest cases.

A majority of us are of opinion that equitable mortgages by deposit of title-deeds should be valid when they are made in Calcutta, Madras, Bombay, Rangoon and Karachi. The practice of raising money on such securities has long been established in those towns, and any attempt to disturb it would cause much inconvenience. Here, again, Mr. Stokes dissents on the grounds (a) that such mortgages are opposed to the policy of the Registration Law; (b) that they lead to evasions of the stamp duty; (c) that they are at variance with the principal of making the system of transfer of immoveable property, as far as possible, a system of public transfer; and (d) that, when the amount secured is Rs. 100 or upwards, they would be inconsistent with the general rule in section 58 requiring a written instrument.

We think, with Mr. Justice West, that nothing in the section (59) declaring the mortgagor's right to redeem should invalidate any provision to the effect that if the time fixed for payment of the principal-money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money. In like manner, we think that nothing in sections 82 or 83 should deprive the mortgagee of his right to interest where there exists a contract that he shall be entitled to such notice.

We concur with the Law Commissioners in the solution which they have proposed (section 68) of the moot question as to whether a power of sale conferred on the mortgagee is invalid, and as there is no prospect of the High Courts or the Privy Council making an authoritative declaration on the subject, we think it desirable to settle the matter by legislation as soon as possible.

For the section (98) as to the abandonment of his security where a mortgagee attaches and sells the mortgaged property, we have substituted the following:—

"98. Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not,

attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 86."

We think that the High Court should have power to make rules for carrying out the provisions of this Chapter.

CHAPTER V.

LEASES.

This Chapter will, in our opinion, be of practical use in the case of leases of buildings, gardens and mines. We agree with the Law Commissioners that it should not of itself apply to the relations between zamindar and raiyat, and we think that the power given to the Local Government by section 115 (now 116) to extend any of the provisions of the Chapter to agricultural leases should only be exercised with the sanction of the Governor-General in Council, and that the requisite notification should not take effect until the expiry of six months from the date of its publication.

The rule laid down in section 106, clause (s) as to the removeability of tenants' fixtures, has been objected to as not in accordance with the laws in force in this country. But it will operate only in the absence of a contract or local usage to the contrary, and will not in practice apply to tenants in husbandry. Moreover, it is impossible to say, with certainty, what the Law of India on the subject really is. The Courts would, therefore, turn for guidance to the Civil Law and the Law of England. The Civil Law permits a tenant to remove all fixtures where this can be effected without material injury to the property, and the strictness of the Law of England has been relaxed where the fixtures have been annexed for the purposes of trade or manufacture, ornament, furniture and domestic use or convenience. The clause in question seems to us to represent, with reasonable accuracy, the rules of the Civil and the English law.

CHAPTER VI.

GIFTS.

We agree with the Law Commissioners that registration should be required in the case of gifts of immoveable property of whatever value. Such gifts are, as a rule, made by a written instrument, and as, under the Registration Act (III of 1877, section 17, clause (a), the registration of such instruments is compulsory, the change of the existing law here proposed is almost nominal.

We have struck out the clause in section 121 (now 122) which is founded on the rule in the Succession Act as to bequests to attesting witnesses. It is, we think, inapplicable to a transaction *inter vivos* where the donor can give evidence of his intention.

We have also struck out the section (120), which declares that the donor is not bound to warranty. It seems to the majority of us useless as denying what no one in this country would ever assert. Our colleague, Mr. Stokes, would retain it as precluding a doubt which may reasonably be felt by the Courts (see Burge II, 145).

We have made verbal and other unimportant amendments in sections 11, 25, 36, 37, 51, 59, 61, 64, 80, 81, 90, 91, 99, 101, 106, 126, 133.

The Bill, as now settled, seems to us a systematic and useful arrangement of the existing law. But we agree with the Law Commissioners that, when the body of substantive Civil Law enacted for India is recast in a more compact and convenient form than that of a series of fragmentary portion, from time to time passed by the legislature, the chapters on sale, mortgage, lease and exchange, contained in the present Bill will probably be placed in close connection with the rules contained in the Contract Act. Till then, may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons. We do not think that these rules, as now amended, will substantially alter or add to the existing law, or that they will invade or displace the functions of the judges of the existing Courts. We, therefore, recommend that the Bill be passed. Drawn originally in England by the former Indian Law Commissioners, it was revised by Sir A. Hobhouse and introduced into the Council of the Governor-General in June, 1877. It has since been twice circulated to the Local Government for opinion and publication, and twice reported on by Select Committees, in February, 1878, and February, 1879. It was then carefully revised by the late Indian Law Commission. It has now been again revised by us. We think, therefore of this Bill, as of the Bill dealing with negotiable instruments, that it is not now likely to be improved without the experiences to be gained from its actual working. We recommend, however, that it should be republished in the *Gazette of India* with this report, and in obedience to the orders of the Secretary of State, it must also be sent home to him, published in the Local Gazettes, and translated into the vernacular languages.

Our honorable colleagues, Messrs. Grant and Paul, have not been able to attend our meetings, and do not, therefore, sign this report.

The 11th March, 1881.

WHITLEY STOKES.

J. PITT KENNEDY.

B. W. COLVIN.

JOTINDRA MOHAN TAGORE.

APPENDIX IV.

GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

Abstract of the proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 and 25 Vic., Ch. 67.

The Council met at Government House on Thursday, the
25th January 1882.

Present :

HIS EXCELLENCY THE VICEROY AND GOVERNOR-GENERAL OF INDIA,
K.G., G.M.S.I., G.M.I.E., *presiding.*

HIS HONOUR the Lieutenant-Governor of Bengal, K.C.S.I.

HIS EXCELLENCY THE COMMANDER-IN-CHIEF, G.C.B., C.I.E.

The Hon'ble WHITLEY STOKES, C.S.I., C.I.E.

The Hon'ble RIVERS THOMPSON, C.S.I., C.I.E.

The Hon'ble J. GIBBS, C.S.I., C.I.E.

Major the Hon'ble E. BARING, R.A., C.S.I., C.I.E.

Major-General the Hon'ble T. F. WILSON, C.B., C.I.E.

The Hon'ble H. J. REYNOLDS.

The Hon'ble Maharaja JOTINDRA MOHAN TAGORE, C.S.I.

The Hon'ble L. FORBES.

The Hon'ble G. H. P. EVANS.

The Hon'ble C. H. T. CROSTHWAITE.

The Hon'ble A. B. INGLIS.

The Hon'ble Raja SIVA PRASAD, C.S.I.

The Hon'ble W. C. FLOWDEN.

The Hon'ble W. W. HUNTER, C.I.E., LL.D.

The Hon'ble SAYYAD AHMAD KHAN BAHADUR, C.S.I.

The Hon'ble DURG CHARAN LAHA.

TRANSFER OF PROPERTY BILL.

The Hon'ble Mr. STOKES presented the final Report of the Select Committee on the Bill to define and amend the law relating to the Transfer of Property.

The Hon'ble Mr. STOKES also moved that the further and final Reports of the Select Committee on the Bill to define and amend the law relating to the Transfer of Property be taken into consideration. He said that only six of the amendments described in those reports were of sufficient importance to require mention in this Council. The Committee had declared that nothing in Chapter II should be deemed to affect any rule of Hindu, Muhammadan or Buddhist law. It did not, in his opinion, affect any such rule, otherwise than by putting Natives as regards their power to make settlements on unborn persons, on the same footing as Europeans. But it laid down, in accordance with the decisions of the Courts, a rule against perpetuities, and two of the Native members who much disliked this rule, and who thought that judge-made law was more likely to be altered than statutory law, pressed the Committee to exempt their personal law from this chapter. They had also saved the rules of Hindu and Buddhist law from the provisions of the chapter on gifts, save only that which required, in the case of a gift of land, writing, registration and attestation. The rule that a Hindu father might, in case of necessity, resume gifts made to his son (Dhayabhaga, II, 57) would thus remain unaffected.

Section 70 of the Bill as referred to the Committee recognized the validity of a power of sale conferred by a mortgage-deed where the principal-money originally secured was five hundred rupees or upwards. They were of opinion that there were parts of the country in which such a power was liable to be abused by Native mortgagees, and they considered it safer to provide that such powers should be valid only, first, where the mortgage was an English mortgage (as defined by the Bill) and neither mortgagor nor mortgagee was a Hindu, Muhammadan or Buddhist; secondly, where the mortgagee was the Secretary of State in Council; or thirdly, where the mortgaged property, or any part thereof, was situate in the Presidency-towns, Karachi or Rangoon. They had amended the section accordingly, and they had taken the opportunity to declare that the provisions of the Trustees and Mortgagees Act, 1886, should be deemed to apply to English mortgages wherever in British India the mortgaged property might be situate, when neither of the parties was a Native. As to this, it appeared there was some doubt, owing to the ambiguity of the expression "cases to which English law is applicable," which was found in Act XXVIII of 1866, section 45.

They thought that the provisions of section 38 (as to the apportionment of obligations relating to property on its severance) might possibly sometimes cause hardship in the case of agricultural leases. They had, therefore, provided that nothing in that section should apply to such leases unless and until the Local Government so directed.

After section 56 they had inserted a section, taken from the Property Act, 1881 (44 and 45 Vic., c. 41, section 5), giving the Court power, in the case of sale of immoveable property subject to any incumbrance, to provide for the incumbrance and to direct that the property should

be sold freed therefrom. In case of an annual or monthly sum charged on the property, this would be done by paying into Court such amount as, when invested in Government securities, the Court considered would be sufficient, by means of the interest, to keep down the charge. In case of a capital sum charged, the amount to be paid into Court would be such as would be sufficient to meet the incumbrance and any interest due thereon. Thereupon the Court might declare the property free from the incumbrance and make proper orders for giving effect to the sale and for applying the capital or income of the fund in Court. This section had been hailed in England as likely to effect one of the greatest reforms ever made in the law of real property ; and there was reason to believe that it would be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the Committee had taken two precautions : first, it had confined the jurisdiction to the High Courts, the District Courts and any other Courts specially empowered by the Local Governments. And, secondly, they had declared that an appeal should lie from all directions and orders given under this section.

They had re-drafted the last paragraph of sec. 71 of the same Bill (now 73), and added a provision limiting the amount for which a mortgagee might, in the absence of a contract to the contrary, insure the mortgaged property against loss or damage by fire. This also was in accordance with the same statute, sec. 23.

They had not extended the Act in the first instance to Bombay, the Punjab or British Burma, as the present Local Governments of those provinces did not wish it to apply to the territories under their administration. But they had empowered them to extend the Act to the whole or any part of those territories ; and they had authorised every Local Government to exempt, throughout the whole or any part of the territories administered by it, the members of any specified race, sect, tribe or class from all or any of the provisions relating to transfer by an ostensible owner (section 41), and the mode of effecting a transfer by sale (section 54, paragraphs 2 and 3), by mortgage (section 59), by lease (section 108), and by gift (section 124). This exemption might be retrospective from the day on which the Act came into force. They thought that the proposed Act should not come into force till the 1st April, so that time might be given to the Courts and the public to become familiar with its provisions, especially those requiring written instruments in case of sales, mortgages, leases, gifts, and exchanges.

And now, having mentioned the changes recently made by the Select Committee, it would be convenient to say a few words as to this important Bill and its history. The primary object of the Bill was, as Mr. Stokes had explained to the Council nearly five years ago, when no one who now heard him was present, to complete the Code of Contract Law (Act IX of 1872), so far as related to immoveable property, and thus to carry out to some extent the policy of codification which the Government of India had happily resumed. Its secondary object was to bring the rules which regulated the transmission of property

between living persons into harmony with certain rules affecting its devolution upon death, and thus to furnish the necessary complement of the work which this Council commenced by passing the law of succession (Act X of 1865), continued by passing the Hindu Wills (Act XXI of 1870), for the Lower Provinces and the Presidency-towns, and would soon, he hoped, end by extending the latter Act to Hindus and Buddhists in the rest of India. Another object of the Bill was to amend the law of mortgages and conditional sales, which had, at least in Madras and Bombay, got into a somewhat unsatisfactory condition.

The Bill was originally framed by the Law Commission, to which the Government were indebted for the Succession Act and for all that was good in the Contract Act (IX of 1872), and which then comprised the late Master of the Rolls, Lord Romilly, Sir Edward Ryau, formerly Chief Justice of Bengal, Mr. Lowe (now Lord Sherbrooke), Sir Robert Lush, Sir John McLeod, the distinguished Madras Civilian who helped Macaulay in framing the Penal Code, and the late Lord Justice Sir W. M. James : all now gone except Lord Sherbrooke. It was sent out in 1870 by the Duke of Argyll, then Secretary of State for India, with instructions to take the necessary steps for passing it into law. In 1876, towards the close of Sir Arthur Hobhouse's tenure of office, when he had become convinced of the expediency and practicability of codifying the substantive law of this country, he took up this Bill and carefully revised it, and some of the points with which it dealt were discussed and settled in the Executive Council. The sections on Powers, which the Bill then contained, were re-drawn by him. The Bill, thus revised, was sent home early in 1877, and in the following April the Government received permission to proceed with it. Sir A. Hobhouse having left India, the Bill fell into Mr. Stokes' hands, and was subjected to renewed examination by his learned friend, Mr. Phillips, then Legislative Secretary, and himself. In June, 1877, he introduced the Bill, and the Council referred it to a Select Committee, composed of Sir Edward Bayley, Sir Alexander Arbuthnot, Mr. Cockerell and Maharaja Jotindra Mohan Tagore, to whom his learned friends Messrs. Paul and Evans were subsequently added. The Bill was then circulated to the Local Governments for publication and translation, and numerous valuable criticisms and suggestions came in from all parts of India.

In February, 1878, the Committee presented a preliminary report, stating that, in revising this important measure, they had been guided by the three principles by which the Government of India desired to regulate its policy of codification, namely, first, that as little change as possible should be made in the existing law, whether established by the Legislature or declared by judicial decisions; secondly, that no additions should be made to the law which were not either necessary or clearly expedient; and, thirdly, that interference with contracts fairly made and usages long established was, *prima facie*, undesirable. They had also borne in mind the great deference due to the late Indian Law Commission, by whom the bulk of the Bill was

framed, and to Sir Arthur Hobhouse, by whom it had been settled. In 1878 the Bill thus revised was republished, and again circulated to the Local Governments, and another mass of criticism was received. The principal objections taken to this Bill in its second form were, first, that, as a whole, it was heterogeneous, and, secondly, that certain parts of it were neither necessary nor expedient. It was said, for instance, that, though the bulk of the Bill dealt with transfer of property *inter vivos* by act of parties, it also treated of conditions in wills, and of succession to a deceased person. It was said, again, that the chapters dealing respectively with the rights and liabilities of owners of limited interests and with property held by several persons belonged rather to the subject of the enjoyment, than to that of the transfer, of property. It was urged that settlements (in the conveyancer's sense of the word) were hardly ever made in India; that what are technically called "powers" were almost unknown; and that the chapters dealing with those subjects were certainly not necessary, and could hardly be said to be expedient. The Committee felt the force of these objections. In fact, they had always felt them. But they were not responsible for the first draft of the Bill, whatever were its excellences or defects. The matters thus objected to, together with others, such as registration and trusts, still more foreign to the proper subject of the Bill, were all dealt with by the draft prepared by the late Indian Law Commission and revised by Sir A. Hobhouse. The great deference due to the Law Commission and to Sir A. Hobhouse had hitherto prevented the Committee from dealing freely with the Bill. Until the opinions of the Local Governments and the results of local experience had been obtained, for them to have altered it would have been to set their individual views against those of the able and learned men who were answerable for the Bill as introduced. But now that these opinions and results had been obtained, the Committee saw that, if the Bill was to go on at all, it must be strictly confined to the subject of transfer of property by act of parties, that was to say, by contract or gift. They had, therefore, omitted chapters VII to XII, both inclusive, which dealt with settlements, powers and the other matters just mentioned.

They added, on the margins, references to the reported decisions of the Indian Courts and the Judicial Committee, which justified the rules contained in the Bill. The Council would see that but few of these rules were devoid of this valuable support. The assertion that the Bill would introduce a mass of new law into India must, therefore, be due to ignorance of the extent to which English law (under the name of justice, equity and good conscience) was actually administered to the Natives by the Anglo-Indian Courts. The function of the Bill, like that of all Indian Codes, was to strip English law of all that was local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population, and could be easily administered by non-professional judges. But the Bill would introduce hardly any new substantive law, and it would not (except in the case of the procedure

relating to mortgages) displace any existing enactment. The rules, for instance, as to the relation of landlord and tenant, contained in the local Acts, X of 1859, XVIII of 1873, XIX of 1868, XXVIII of 1868, Bengal Act VIII of 1869 and Madras Act VIII of 1865, would all remain untouched.

To the body of local usages and contractual incidents which in India, as in other countries, existed as to the transfer of land, the tenderest care was shewn by the Bill. Not only was local usage expressly saved in the sections 98, 106 and 108, but the effect of section 2, clause (a), would be to maintain intact the statutory force which the legislature had given to local usage in those two *pays de coutumes*, the Panjab and Oudh; and throughout India all the many incidents of a mortgage or a lease, which were not inconsistent with the provisions of the Bill, would remain wholly unaffected.

The Bill was then simultaneously circulated for the third time to the Local Governments, and referred to a Commission, composed of Sir Charles Turner, the present Chief Justice of Madras, Mr. Justice West of the High Court of Bombay and himself.

That Commission made several amendments, both in the wording and substance of the Bill, but the important additions were only three. First, they set out in full on the face of the Bill, several rules applying to transactions between living persons, which in the original draft were only expressed by way of reference, *mutatis mutandis*, to certain sections of the Succession Act dealing with matters such as election, contingent bequests, conditional bequests and bequests with directions as to application and enjoyment, and which, therefore, could never have been applied by unprofessional Judges without risk of serious error. Secondly, they required, at the suggestion of Sir Henry Maine, who was a strong advocate of the continental system of a public transfer of land, a written and registered instrument in certain cases of sales, mortgages, leases, exchanges and gifts of immoveable property. Thirdly, at the suggestion of one of the Hindu critics of the Bill, they inserted a chapter on gifts.

The Report of the Indian Law Commissioners, 1879, was duly communicated to the Select Committee, which then consisted of Mr. Pitt Kennedy (a very eminent master both of English and Hindu law), Mr. Colvin, Maharaja Jotindra Mohan Tagore and himself, and they carefully considered it, as well as the mass of comments on the Bill which had come from all parts of India. As to sales, they agreed with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer; and they were inclined to go a little further in this direction than seemed good to the Law Commissioners. Thus, they thought that, in the case of a reversion or other intangible thing, though its value might be less than Rs. 100, the transfer should be made only by registered assurance; they had altered section 54 accordingly, and the Government of India, in its executive capacity, approved of this alteration.

As to mortgages, the Committee agreed with the Law Commissioners that the requirement of registration would not only discourage fraud and facilitate investigations of title, but that it would also preclude some difficult questions of priority. A majority of them, however, thought that, when the principal-money secured was less than Rs. 100, the mortgage-deed need not be registered, and they altered the Bill accordingly. A majority of them also thought that equitable mortgage by deposit of title-deeds should be valid when made in the Presidency-towns, Rangoon and Karachi. To this the Government of India in its executive capacity had also agreed. As to leases, they all thought that the chapter would be of practical use in the case of leases of buildings, gardens and mines, and they agreed with the Law Commissioners that it should not of itself apply to agricultural leases, in other words, to the relations between zamindar and raiyat.

As to gifts, they agreed with the Law Commissioners that registration should be required in the case of gifts of immoveable property of whatever value. Such gifts were, as a rule, made by a written instrument, and as, under the Registration Act, the registration of such instruments was compulsory, the change of the existing law here proposed was almost nominal.

The Council would see that both the Government of India and the select Committee approved of the proposed requirements of writing and registration in the case of most transactions relating to immoveable property. It was right to say that this approval was to a large extent due to the arguments of the present Chief Justice of Bengal, and, as the matter would probably be much discussed to-day, Mr. Stokes thought it right to read a few extracts from his Lordship's minute. Referring to a letter from the present Chief Commissioner of British Burma, Sir Richard Garth observed :—

“It is stated in paragraph 5 of that letter that as an abstract question there appears to be a general concurrence of opinion, that it is highly desirable that there should be a complete contemporaneous record of all transactions relating to land, and that the system of transferring immoveable property should be made, as it is on the continent of Europe, by a publicly-recorded transfer.”

“I rejoice to find that there is a general concurrence of opinion upon this most important question. But then Mr. Bernard goes on to say in the same paragraph :—

‘To what extent this could be carried out in practice is open to some doubt. It could not be done completely, without requiring a written record of every such transaction, and barring parol transactions relating to immoveable properties ; in other words, without the introduction of some kind of a statute of frauds, for which the country is certainly not yet prepared.’

“Now, here is a proposition for which, as it comes from so high an authority, I presume there must be some good foundation, though at present I have been unable to discover it.

"If there is such a general concurrence of opinion that a contemporaneous record of all transactions relating to land is desirable, why is it that this country should not be prepared to accept that which would assuredly prove to it a very great blessing ?

"I suppose it is almost undeniable that to compel such transactions to be reduced to writing, and to have them publicly registered, is about the most effectual means that any Government can provide of preventing fraud in such matters.

"I suppose it is also undeniable that there is as much fraud and forgery and perjury committed in this country, with reference to such transactions, as there is in any country in the world.

"It is really almost impossible for any one who is inexperienced in the proceedings of Courts of Justice in India to imagine the amount of wickedness of that particular kind which is habitually practised there.

"It is literally true that there is hardly any case of importance relating to land in which one or other of the parties does not himself attempt, or charge his opponent with attempting, some fraud or perjury ; and it is almost a common form in most suits for each of the parties to allege that some at least of the documents which are filed by his adversary are forgeries.

"The utter disregard of truth and moral sense which this practice involves is most deplorable. There seems to be little or no feeling of shame or disgrace, even amongst men of good position and fortune, when they are charged with, or even found by the Courts to have committed, such offences. A wealthy Zamindar who is accused by his opponent of forging a deed or a rent-roll, or of having been privy to such forgery, never troubles himself, as a rule, to go into the witness-box to deny the charge ; nor does he seem to think the worse of himself, nor do his family and friends seem to think the worse of him, when the Civil Court finds him guilty of it.

"So much has this system become habitual, that sometimes, when a suitor has a perfectly honest case and sufficient reliable evidence to support it, he will nevertheless resort, or allow his friends and advisers to resort, to some forgery or perjury in order to improve, as he imagines, his position ; and many a man has run a great risk of losing a righteous case in that way.

"Now, this is nothing short of a monstrous national evil. It is frequently subversive of justice. It gives rise to the grossest immorality. The Courts may check it in some degree by prosecutions for perjury and the like, but the system is so deeply rooted, and Natives of all classes think so lightly of its iniquity, that it is often difficult to obtain convictions in such cases, and it is to the legislature, and the legislature only, that the nation must look to repress the mischief in any material degree.

"And the legislature have the means, if they would only exercise it, of greatly decreasing the mischief. They have the same means which

has been successfully resorted to for the same purpose in England and other European countries, where the evil is much less formidable and the necessity for remedying much less pressing.

"That means consists simply in requiring all contracts and transactions relating to land to be in writing, and registered.

"So far as registration is concerned, this has already been enforced with regard to all written transactions exceeding Rs. 100 in value, and, if the recommendations of the Registration Committee are carried out, the obligation will extend to all written transactions.

"It would then only remain to require all contracts and transactions relating to land to be reduced into writing; but for this, we are told, 'the country is not prepared.'"

Sir R. Garth then enquired, first, what proportion of transactions relating to land were at the present time not reduced into writing, and secondly, what proportion of those which were now effected by parol were honest, *bonâ fide* transactions. He proceeds:—

"Now," he says, "as regards the first of these questions, I have been at some pains to obtain a correct answer to it from gentlemen of experience in all the districts of Bengal. I have consulted judges, vakils, zamindars and others whom I considered most likely to give and to procure for me the most reliable information, and the result is very much what I had expected.

"My question, be it remembered, has reference to contracts, arrangements and conveyances relating to land of all descriptions, sales, gifts (other than testamentary), mortgages, partitions, exchanges, transfers, trust deeds, family and other arrangements and leases of all kinds always excepting leases made to cultivating raiyats. And I learn from the best authority that a very small proportion indeed of such instruments are now effected by parol, and that this small proportion is yearly and rapidly becoming smaller. Men of all ranks and classes are realising more and more the wholesome and undoubted truth that oral arrangements, especially in a country like this, are utterly unsafe and unreliable; and that, if it is worth a man's while to acquire property and give money for it, it is also worth his while to secure it by an instrument in writing, properly authenticated and registered.

"Moreover, from the answers which I have received to the first of the above questions, I have gathered a great deal of valuable information from reliable sources, which virtually answers the second question, namely, what proportion of these transactions which are now effected by parol are honest and *bonâ fide*?

"The answer is,—comparatively few. The arrangements which, speaking generally, are now effected by parol are partitions of small family properties, gifts and exchanges of small pieces of land between members of the same family, small grants of land to members of a family or the village-priest, and the like; but a very large proportion of these so-called parol arrangements are made for the purpose of defeating creditors, or with some other fraudulent object; they are

generally brought forward in Courts of justice to defeat the title of some *bond fide* purchaser for value ; and in the large majority of cases they are disbelieved by the Courts and found to be fraudulent.

"The fact is, that, so long as the law allows facilities to people to defeat *bond fide* purchasers, the dishonest and ignorant try to take advantage of them ; and it is, of course, a much easier thing, and involves less risk, to set up fraudulent transactions by word of mouth than by a written instrument, more especially as, in all transactions above Rs. 100 in value, the written instrument is useless unless it is registered.

"And the present law, too, works in justice in this way. So many of these oral transactions which are set up in Courts of Justice are found to be fraudulent, that judges are sometimes induced to mistrust and often to reject as fraudulent the few that are genuine."

The Chief Justice then concluded with the following weighty opinion :—

"On the whole, I would strongly advise the Government to consider the expediency of making that which now is undoubtedly the general rule the law of the land. I am satisfied that it would be the means of preventing a vast amount of fraud and litigation, that it would be a great blessing to the whole community, and especially so to those who want security and protection most, namely, the poorer and more ignorant classes."

The Bill was then republished in the *Gazette of India*, with the committee's third report. It was also published in the local *Gazettes* in English and (except in Burma) also in the vernacular languages. It had been before the public, in what was substantially its present form, since the 12th March 1881. Since then the Committee had received no criticisms of importance, and the Bill seemed now to be approved by all the Local Governments, except those of the Punjab, British Burma and Bombay. The Bill, as now settled, seemed to the Select Committee a systematic and useful arrangement of the existing law. But they agreed with the Law Commissioners that, when the body of substantive civil law enacted for India was recast in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the legislature, the chapters on Sale, Mortgage, Lease and Exchange, contained in the present Bill, would probably be placed in close connection with the rules contained in the Contract Act. Till then they might fitly be left in a law containing what the Contract Act did not contain, namely, general rules regulating the transmission of property between living persons. Mr. Stokes trusted, then, that the Council would to-day permit the Bill to become law, no Bill in the course of his eighteen years' experience of this Council had ever been so carefully considered. It had been thrice circulated to the Local Governments for opinion and publication. It had been criticised by over a hundred of the ablest and most experienced officers in the country of whom nineteen were, he was happy to say, Natives. It had been five times reported on by Select

Committees. It had been carefully revised by the late Indian Law Commission. The Committee thought, therefore, of this Bill, as of the Bill dealing with negotiable instruments that it was not now likely to be improved without the experience to be gained from its actual working.

The Hon'ble DURGA OHARAN LAHA said he had only a few remarks to make in regard to the Bill. The alterations which had been recommended by the Select Committee in their last report, to the effect that nothing in the second chapter of the Bill should be deemed to affect any rule of Hindu, Muhammadan or Buddhist law in respect of the transfer of property, was, in his opinion, a decided improvement, and removed the objection which was justly taken by the Hindu community. It showed that the Legislature had no intention to interfere with the personal law of the Natives regarding the transfer of property. He thanked the honorable and learned member and the Select Committee for the consideration they had shown in this matter, and it afforded him much pleasure to give his support to their recommendation.

The Hon'ble SAYYAD AHMAD said : " My Lord, I wish, with Your Excellency's permission, to say a few words before the discussion on this Bill closes. The Bill is one of the most important ever introduced in this Council, and I congratulate my honorable colleague, Mr. Stokes, for having brought it to the stage which it has now reached. I have carefully read the Bill with the special object of discovering whether any rule contained in it is such as would disturb the customs and usages of the people of India, and especially the Mussulman community. And I have no hesitation in saying that none of its provisions is calculated to affect any portion of the Muhammadan law. Nor, indeed, so far as my knowledge of Hindu law extends, can I see anything in the Bill which can interfere with the customs and usages of my Hindu fellow-countrymen. The wise rule, always kept in view by the Indian Legislature, of saving the personal laws of the people of India, has been duly observed in this instance, and I believe not a voice can be raised against the Bill by the people of India on the ground of its interfering with their personal laws.

" But, my Lord, it is not only on this ground that I am anxious to give my humble support to the Bill. Independently of any considerations of expediency with reference to the sentiments of the people of India, I look upon this piece of legislation as a great step in the direction of that great object which, I trust, will, before many years pass away, be fully achieved. I refer to the formation of a code of substantive civil law as complete and precise as our Penal Code. The law which is to govern the transfer of property *inter vivos* must necessarily form an important chapter of the Civil Code in contemplation.

" My Lord, if anything I can say can be regarded as representing the feelings and opinions of my countrymen, I will take it upon myself to say that this Bill will be welcomed by the Native public when it becomes law. It will be welcomed by those who possess property, by those who are under the necessity of transferring it, by those who wish to acquire property or to advance money on landed security. It will be welcomed alike by the suitors who quarrel, and by the judges who have to decide those disputes. And, in saying this, I am expressing the convictions that have grown in me during an experience of half a century, as a citizen of the British Empire

in India, as one who has had the honour of serving Government as a judicial officer for no less than thirty-five years, as one who has frequently been consulted in private life by intimate friends in regard to their personal transactions, such as will be governed by the provisions of this Bill when it becomes law. My Lord, I make these observations personal to myself, for I believe that the best way in which I can support this Bill is to base my conclusions in favour of its becoming law, not on theories, but of facts—not on speculation, but on my actual personal experience of the past. And, my Lord, since this Bill is the most important outcome of the policy which brought about the establishment of the Law Commission of 1879, since this Bill is a decided and significant step towards the codification of our substantive civil law, I trust your Lordship will permit me to say, in as few words as possible, what I consider the state of the real Native feeling to be in regard to the important question of codification. I am mournfully aware that codification has its opponents, some of them gentlemen holding high rank in the administration, and entrusted with large responsibilities, and to whose opinion weight, should, no doubt, be always attached. But I cannot be far wrong in saying that almost all the opposition comes from those who are least likely to become subject to the uncertainty and risk to rights and property which the absence of codified law involves. So far as I am aware, the Native public has never raised its voice against codification. To them, codified laws mean the introduction of certainty where there is uncertainty—precision, where there is vagueness; nor can it be said that codification is unpopular even among the most conservative sections of my countrymen. I must have lived to declining old age amongst them in vain if I am not, even at this time of life, in a position to say confidently that of all the innumerable blessings of the British rule, the one my countrymen esteem most is justice; that justice, in their eyes, means peace and order which, in other words, mean security to life and property—the sole aim and end of Government.

“At present, whilst a splendid Penal Code and a Criminal Procedure regulate criminal matters, the civil law is administered on the somewhat vague, though noble, principle of ‘justice, equity, and good conscience,’—a principle much of whose beauty is practically spoilt by the fact that individual judges in similar cases do not take the same view of that noble maxim. The result is an uncertainty as to rights which reduces litigation to a form of pecuniary speculation, from which springs that most deplorable class of suits in which the parties, agreeing as to facts, have no authoritative means of ascertaining the law. Codification, and codification alone, can remedy the evils which arise from uncertainty of the law; codification alone can enable the public to know their exact rights and obligations; codification alone can enable proprietors and litigants, advocates and judges, to know for certain the law which regulates the dealings of citizens in British India; codification alone will enable the deliberate will of the legislature to prevail over the opinions of individual judges; and litigants will then be more anxious, before going into Court, to consult the statute-book of the land than the mental proclivities of the individual judges before whom their disputes may have to go for decision. To say that the Native mind is unfamiliar with the idea of living under systematically codified law, is to say what the truths of history do not justify. The institutes of Manu furnish a noble example of ancient

codification, and the law-abiding tendencies of the Hindu mind have made them adhere to its behests to this day. The history of the Muhammadans furnishes a long series of attempts to codify their laws. In the earliest days of the Caliphs of Bagdad, books were compiled under the authority of the Caliphs, to supply the requirements of a Code. These books from their very names indicate that they were meant to be codes. The attempts at codification continued down to the time of the Mughal Emperor, Aurangzeb, and, in the Fataw-i-Alamgiri, we find, perhaps, the most magnificent and most durable monument of that remarkable monarch's reign. The conditions of life in India have since undergone a great change, and whilst the personal laws of Hindus and Muhammadans are secured to them, the British rule has asserted its right to regulate purely temporal matters so as to suit the more advanced requirements of the present age. The people of India have gladly and loyally accepted this fact, and there can be no justification for saying that the mind of the Native public is unprepared for codification, or that attempts on the part of the Government to supply them with a systematic Code will be regarded with feelings other than those of satisfaction.

"My Lord, I should not have digressed into these somewhat general observations had I not felt that much misapprehension prevails in regard to the attitude of my countrymen towards codification, and also that I could find no better opportunity for giving such support as lies in my power to the policy of codification,—a policy of which the Bill now before us is an illustration of considerable importance.

"My Lord, the Bill, as it now stands, is in my opinion fit to pass into law without any further amendment. Delay in passing it would only postpone those advantages which, I feel sure, will accrue from it to the public. Enough thought and consideration have been bestowed on it, and the outside public have had ample time to know its provisions.

"My Lord, I shall therefore vote in favour of the motion that the Bill, as it now stands, be passed into law without any further delay."

The Hon'ble RAJA SIVA PRASAD said he had had some objections to the Bill, but as the Select Committee had been good enough to accept his amendments, he had now simply to explain the objections he had taken. He did not object because he thought that the Bill touched upon the Hindu law as interpreted by the Judicial Committee of Her Majesty's Privy Council and the English Judges of the Indian Courts, but because it affirmed those decisions on certain points regarding the right of a Hindu to dispose of his property by creating perpetuities or bequests in favour of unborn persons. The Hindu community did not acquiesce in those decisions, and they did not wish to see them affirmed by the legislature until they had had an opportunity of contesting the points fairly, and, if necessary, of proposing a legislative enactment on the subject. Of all the perpetuities, the worst was that of mistakes, and he hoped that these vexed points might be satisfactorily settled during His Excellency's brilliant rule.

The Hon'ble Mr. CROSTHWAITE said that, in the position which he held as Judicial Commissioner of the Central Provinces, the presiding judge of a non-chartered High Court, and in the face of the opposition undoubtedly existing in certain quarters, he felt bound, in spite of his reluctance to occupy

the valuable time of the Council, to give reasons for the vote he was about to record. The opposition was of two kinds. There was an opposition to the principle of codification, denying the possibility, and doubting the utility, of formulating the civil law. And there was a more definite opposition directed against this particular measure.

It might be enough to say that the principle of codification had been, as he believed it had been, definitely accepted by the Government, both here and in England, and that no choice was left to the Council in the matter.

He would, however, go beyond this argument, and would endeavour to answer some of the objections that had been made. The obstacles in the way of codifying the law in India were, no doubt, great, and were probably best appreciated by those who had had to frame and carry through this and similar measures. They arose, however, not so much from any inherent difficulty in making a law which should contain rules both for simple and for complicated cases, but from the numerous conflicting interests to be cared for, and the widely varying conditions of the different races for whom the Council had to legislate. The compromises necessary to reconcile such interests had naturally left their mark upon the Bill, which was thus laid open to the charge of being incomprehensive and incomplete.

As an example of the difficulties that had had to be met, he would give to the Council the history of section 69. It was the custom among English people, when money was lent on the mortgage of land, to insert in the mortgage-deed a power of sale, authorizing the mortgagee, subject to certain conditions, to sell, without the intervention of a Court, the mortgaged property if the money was not paid when it became due.

But it had always been held by the most experienced Indian authorities that a power of this kind would work mischievously in rural India. Hence, in the first drafts of the Bill, such powers were declared to be invalid.

The Indian Law Commissioners, however, for reasons given on page 35 of their report, altered the drafts and declared the power to be valid in all cases in which the mortgaged property should be five hundred rupees or upwards.

Representing, as Mr. Crosthwaite thought he was bound to do, the interests of the ignorant landowners of Upper and Central India, who borrowed money without the aid of legal advice, and dealt with men far above them, as a rule, in intelligence and astuteness, he felt himself compelled to dissent from the opinion of the Law Commissioner, and the section was altered so as to enable the Local Governments to declare the areas within which this power of sale should be valid. It appeared, however, that this alteration was not in accordance with the views of the gentlemen whose interests his hon'ble friend Mr. Inglis so ably represented—interests which must be respected by all who had the true prosperity of the country at heart. A fresh consideration of the matter became necessary, and the result the committee arrived at was embodied in the present section 69 of the Bill, and which, if it satisfied Mr. Inglis and his friends, as he believed it did, was also quite sufficient to guard the interests of those whom he had in view.

Mr. Crosthwaite mentioned this to show what difficulties had had to be met, and how impossible it was that a code of this nature, which was not always understood by those who were affected, or thought they were affected by it, could be otherwise at first than imperfect, incomprehensive and, to the stiff legal sense, disfigured by compromises and exemptions.

Much had been heard, in relation to the Bill, of the difficulty that would arise to the people if it was passed. The two hundred and fifty millions of India were cast in the teeth of the Council, and the unfortunate peasant was represented as driven to distraction by the complicated provisions of the law.

Now, as to any difficulty of this nature which arose or was likely to arise from this Bill, it was, he believed, very much exaggerated. Codes of the kind were like arithmetic books, with the exception that people were not obliged to learn them. A man whose whole transactions consisted of a few simple acts of barter had no occasion to trouble himself about the rule of three or compound fractions. And, in like manner, it was only those whose transfers were subject to conditions and interests, multifarious and complicated, who would be affected by the more complex and intricate provisions of the Bill.

The necessity of codification arose from the present state of the law, combined with the nature of the Courts. It was the fashion to speak as if the present Bill would supersede a code of clear case or statute-law. Whatever might be the case within the jurisdiction of the Calcutta High Court, there was certainly, in the parts of India with which he was acquainted, no clear body of law on the subjects dealt with in the Bill. To use the words of one of the officers, Mr. Quinton, who had recorded an opinion on the Bill—"Our Courts have to grope through the wilderness of precedents on the subject of sales and mortgages."

The progress of a difficult case was somewhat in this wise. The Court of original jurisdiction had not much legal training or learning, and, as the Government did not provide it with text-books or commentaries, or even Law Reports, its law-library was usually confined to copies of the Acts and Regulations. It was puzzled by the precedents produced by the contending parties, who, being at liberty to pick and choose among the decisions of four High Courts, had no difficulty in showing authorities for every view of the point in issue. If there was no ruling on the matter by the Court to which the judge was subordinate, he eagerly grasped the precedent which seemed most to the purpose. On appeal, the Lower Appellate Court, which was more experienced and better informed, and received copies of the Indian Law Reports, was often compelled to differ from the judge below. The result was a second appeal, in which the High Court, having more information, a better library and more leisure to go thoroughly into the authorities on the point, was often obliged to take a different view from either of the Courts below.

And no one could say what the decision of the Judicial Commissioner would be, unless that Judge had had a similar case before him, or unless the matter had been decided by the Privy Council; for he also might pick and choose between the rulings of four chartered High Courts and was bound by none. He was often like a man standing at a place where four roads met, and where there was no sign-post. It might end by his following none of the made roads, but taking a straight line of his own across country. Whatever might be the result of the present state of things, it was not certainty.

How far this was a true description for Bengal and for the Courts under the Calcutta High Court, Mr. Crosthwaite left his hon'ble friend Mr. Evans to say.

Now, he did not venture to hope that the present Bill would remove all uncertainty; and, for a time, until the meaning of each section had been thoroughly understood by the first Courts, it would probably increase litigation.

But, speaking as a non-professional judge, and even admitting, what he did not admit, that all the charges of imperfection brought against the measure were sound and true, still he said that the Bill was a step in the right direction, and he thought that he had with him the great body of the non-professional judges, whose opinion was in this matter to his mind the best guide. For it was not to an athlete that a person would go for advice as to the best description of crutch. He could well understand the feelings of a thoroughly able and learned lawyer with regard to a Bill of this kind. It dealt with matters as familiar to him as his alphabet, and it dealt with them in a way that did not quite suit his sense of taste as a legal artist. He thought that he could have done it better himself, and he felt that the cut-and-dry sections of the law would tie his hands and prevent him from doing that perfect justice at which it was the pride of all the judges to aim. Mr. Crosthwaite could well understand this. But, at the same time, he was sure that for the non-professional judge, who must, for obvious reasons, preside in the Courts for some time to come, anything was better than the present chaos in which imperfect knowledge had to struggle with the conflict of authorities.

He would briefly notice some of the more definite objections taken to the present Bill.

It was questioned, he believed, by some whether it correctly represented existing law.

This was a point on which his opinion would not be taken. But perhaps his hon'ble and learned friend Mr. Evans would state his opinion on the matter. He might quote from the notes of many of the officers who had criticised the Bill. He contended himself with citing the opinion of the Hon'ble Mr. Justice Field, because he believed no man was better acquainted than he was with the statute and case-law of India. He said :—

"I have again carefully examined the Bill as altered and revised, and, speaking generally, I think it has now been brought into harmony with the law of India, and will, in all probability, prove a useful measure."

It had been urged—urged indeed in a very forcible manner by the Punjab authorities, who had exempted themselves from the operation of the law—that the Bill would interfere with and override many of the old customs so dear to the people. He had searched the papers in vain for any specific instance of a custom so overridden, and he ventured to say that such customs must be few indeed. He was speaking of the Bill apart from its saving clauses. There were many customs of inheritance, marriage, adoption and other social matters. But customs, properly so called, regarding sale or mortgage or gift, there were, he believed, none or very few. Mr. Crosthwaite could not help thinking that much of the outcry about custom arises from a lax and unscientific use of the word. A legal custom,—his hon'ble friend the Law Member would set him right if he was in error,—a custom, that was, which the law would recognise and the Courts act upon, must be immemorial, invariable, reasonable and established beyond doubt. Now, it could be hardly doubted that this was not the sort of custom which some of the opponents of the Bill contemplated. For example, he quoted from a letter by Secretary of the Punjab Government, which was printed on page 221, Vol. I, of Mr. Tupper's Punjab Customary Law :—

"His Honour had always held that directly any attempt is made to legalise a custom its virtue as a custom is lost. The reason why the legislature provides

for the observance of customs in judicial decisions is because such observance provides for the fluctuation of public sentiment and for the development of national ideas, and enables the Courts to take into consideration both the one and the other in adjudicating on questions of social interest. As soon as the impress of the legislature is stamped upon such customs, they become to all intents and purposes unalterable records of a state of things which may continue and may change, while a change in the body of substantive law thus formed is very difficult to effect without the pressure of an influence which a social revolution only could exercise."

Now, Mr. Crosthwaite ventured to say, with all deference to the gentleman who wrote that letter, that the object of the legislature was not what was described. A custom fluctuating with public sentiment was a contradiction in terms. To administer civil law on the basis of the changing sentiments and imperfectly known usages of the people would lead to a confused labyrinth of decisions in which no right would be secure, and in which the unfortunate Judges, and more unfortunate suitors, must wander like the blind led by the blind.

It must be remembered that, when a Court had once decided that a custom existed, the custom was as binding and rigid in its operation as a legal enactment; nay, more so, for the legislature, especially in India, would always be more reluctant to repeat a custom than to amend one of its own laws. But leaving this question aside, the Bill had been so framed as to save every custom or usage that could have any title to legal recognition. Mr. Tupper, than whom there could be no better authority, admitted this, although he opposed the extension of the Act to the Punjab. On page 35, Vol. I, of Punjab Customary Law, Mr. Tupper said:—"The Transfer of Property Bill saves the provisions of any enactment not thereby expressly repealed. Sections 5 and 7 of the Punjab Laws Act are therefore unaffected; also sec. 16 of the Punjab Land-revenue Act. Accordingly, the whole of our customary law, and the existing system for enforcing it, so far as that measure is concerned, remain intact."

The same applied, *mutatis mutandis*, to the Central Provinces, where there was in force an enactment similar to the Panjab Laws Act. It was impossible, therefore, that any custom properly so-called should be overridden by the Bill. Coming now to the personal law of the Hindus, Muhammadans and Buddhists, Mr. Crosthwaite believed it also was perfectly safe under the Bill.

Scrupulous care had been taken not to touch the personal law of any race. Mr. Crosthwaite, for one, would be reluctant in the extreme to do anything that would trench on the province of Hindu law—a law for which he entertained a great respect, and which was in many ways eminently suited to the genius of the people who lived under it. The only sections which were intentionally drawn otherwise than in accordance with that law were those sections which required certain descriptions of transfers to be made by written instruments. And, in order to prevent any possible hardship to the more backward tribes from this provision, power had been given to the Local Governments to exempt the members of any race, sect, tribe or class from all or any of those provisions—a power which would, he hoped, be exercised carefully. So far as he could discover from the papers, none of the Hindu lawyers who had criticised the Bill accused it of touching their law.

The only specific charges brought against the Bill in that respect were contained in a paper forwarded to the Select Committee on the 9th instant by the Hon'ble Mr. Justice Cunningham. Anything coming from a Judge of Mr. Cunningham's eminent learning and ability must have great weight. Mr. Crosthwaite confessed, when he first read Mr. Cunningham's note in which he represented the Bill as making piecemeal alterations in Hindu law, he was startled. But, after the best examination of the subject which he could give to it, he came to the conclusion that the matters referred to by Mr. Cunningham were unimportant. He objected to some words in section 6, which the Committee had already omitted for other reasons, but which he believed, in their intention at any rate, were not contrary to Hindu law, and came, if he was not mistaken, from the hand of a very eminent lawyer well acquainted with Hindu law, Mr. Pitt Kennedy. Mr. Cunningham took exception to the wording of an illustration as inaccurate. That the Committee had corrected. Another section to which he objected, and which dealt with the rights of a *bonâ fide* purchaser of property subject to a charge for maintenance, was undoubtedly in accordance with existing law: the second clause of section 44, which dealt with the rights of a transferee of a share of a joint family dwelling-house, might be new, that was, there were no rulings to support it. But it was reasonable and in accordance with Hindu sentiment, and was, he believed, suggested by his hon'ble friend the Maharaja Jotindra Mohan Tagore.

Mr. Crosthwaite confessed that the examination of the Hon'ble Mr. Cunningham's paper satisfied him that the Bill had not trespassed on the sacred ground of Hindu law.

But another class of objectors arose at the last moment, represented by his hon'ble friend Raja Siva Prasad, for whose opinion as a learned Hindu he had great respect. This gentleman and his friends objected to the Bill, not because it infringed Hindu law, but because it did not infringe it. They wished the legislature to go behind the decisions of the Judicial Committee of the Privy Council and of the Indian Courts, and to adopt the interpretation of Hindu law which some Pandits of Benares thought to be right. The question which they would raise was a very large one—whether Hindus had the power of creating perpetuities or not. The Privy Council (Judicial Committee) had decided that they had no such power, and the Bill in section 14 was framed accordingly.

It was impossible, if the question was to be dealt with in the Bill at all, to do otherwise than follow the rulings of the highest Appellate Court. But there appeared to be so strong a desire on the part of the Hindus, so far as the Committee could judge, that these rulings should not be affirmed by the legislature until the Hindus interested in them had been able to contest the point further, that they thought it best to save Hindu, Muhammadan and Buddhist law from the operation of Chapter II. This, to a certain extent, weakened the Bill, and it was a kind of legislation which to him personally, and no doubt to others of those who had consented to it, seemed feeble and unsatisfactory. But it was clearly inexpedient to deal with a very large question of this kind, the decision of which could hardly be said to have been part of the direct object of the Bill, otherwise than with the greatest caution and deliberation. There was, therefore, no course open to the Committee, but to delay the Bill and put it off *sine die*, or to exempt the personal laws of Hindus from the operation of Chapter II.

Mr. Crosthwaite objected strongly to delay, as he thought that no advantage could possibly arise from it. The only chance of getting a more perfect law was by the experience gained in working this. A Bill of this kind lost its continuity by passing through a multitude of hands, and ran the danger of becoming a piece of patchwork. The second course had, therefore, been followed, and his hon'ble friend, Raja Siva Prasad, was now free to use his efforts to procure for the Hindus a power little consonant with the present state of things,—a task in which, considering the rapid progress now being made by his countrymen, he could hardly succeed.

As to the technicality of the Bill, of which much had been said, a law of this kind must be technical. Mr. Crosthwaite could not understand how a law on such a subject could be written within reasonable compass without using technical terms. It was perfectly intelligible to any one who understood English and had the requisite elementary knowledge of the subjects dealt with. The best proof of this was the mass of criticisms elicited from non-professional judges—criticisms which showed beyond doubt that they understood the Bill; and, if the judges could not understand a Bill like this, what hope would there be of their understanding cases that would come under the law? There was, however, one thing he would like to urge on the attention of the Legislative Department. The Local Governments should be asked to take more than ordinary care in the translation of these codes. No one but a lawyer who was also a scholar could translate them accurately. But there was no difficulty in finding competent men, whether Natives of India or Englishmen, to do the work. It might perhaps be necessary to pay them somewhat more than was given to the ordinary translator. But the cost would be comparatively a mere trifle, and, as the Bills had already been translated, and only needed revision, it was a work that could not require more than a week or two to complete.

The Hon'ble Mr. EVANS said he felt bound to detain the Council for a short time with a few remarks which he had to make on the subject of this Bill. But he hoped His Excellency the President would pardon him if he asked for information on a point of procedure. He wished to know whether any vote was intended to be taken on the present discussion, or whether it would be taken on the amendment which appeared in the notice-paper.

His Excellency the President observed that that must depend upon circumstances. The Council would be entitled to vote on the present question, and again, subsequently, on the motion of the Hon'ble Mr. Plowden. At the present moment, no opposition had been expressed to the motion before the Council, and, consequently, so far as the discussion had gone, His Excellency supposed that no vote would be taken upon it. But, if his hon'ble friend had any general observations to make, this appeared to be the proper stage for him to make them. Mr. Plowden's motion was a definite motion for postponement, and, strictly speaking, the discussion ought to be confined to that particular question.

The Hon'ble Mr. EVANS continued:—He trusted the Council would not deem it a waste of time, if he briefly reviewed the circumstances which led to the introduction of this important measure. Even in England there was a steadily growing feeling in favour of codification. But there the law, though contained in that "wilderness of single instances"—the reports—was the slow

and gradual growth and development of centuries ; and there the judges were all professional lawyers of eminence, familiar from long and daily practice with the principles of law and the method of applying them, and able, by lifelong study, to find their way unhesitatingly through the labyrinth of law reports, and they had the assistance of an able and highly trained Bar. Here matters were very different. The Hindu law relating to inheritance and some other matters remained in full vigour partly because it was intimately bound up with religion. But the greater portion of the ancient civil law of the Hindus relating to contracts—the traffic of man with man in the ordinary relations of life—had become obsolete and sunk into oblivion.

When the English began to rule this country, they found that, after securing to the people such laws as they found in living existence, there was a great void to be filled, and this they did by the simple injunction to the judges in the Mufassal to decide all cases not otherwise provided for according to equity and good conscience. Where were the judges to look for the rules of equity ? They could find little or no guidance among the collection of archaic rules and customs which stood out amidst the débris of the ancient Indian systems, and naturally fell back on the rich store-house of English law. That law, elaborated by eminent jurists in the course of centuries with the aid of the invaluable legacy left us by the Roman Empire, was naturally resorted to by all who were in search of principles.

The whole history of our judge-made law for the last century was an illustration of this process. Sometimes broad and general principles of universal application were laid down ; sometimes narrow and technical rules peculiar to England were introduced and subsequently exploded ; and still the course of formation, destruction and alteration went on till the records of it reached the unwieldy proportions of the present mass of law reports.

Then it was felt that something ought to be done. Very few of the judicial officers in India were trained professional lawyers. Most of the courts of first instance had no libraries of any sort, no text-books, no means of reference, and yet their judgments were all liable to come before higher and better-instructed tribunals, and ultimately before the High Court, where those judgments were set aside because they ran counter to rules contained in cases which the authors of those judgments had no knowledge of and no means of knowledge.

The perplexities of judicial officers in this state of things had been well described by his hon'ble friend Mr. Crosthwaite, and the sentiments of the suitors as to the uncertainty of the law could not be better represented than they had been by the Hon'ble Sayyad Ahmad Khan with his long and varied experience.

The law relating to the transfer of property was the subject now before the Council.

It was long ago decided by the Home and Indian Governments that the codification of this branch of law was desirable. The importance of it was manifest. Nothing could be more important than the security of titles and the avoidance of uncertainty and confusion in dealing with property ; that uncertainty and confusion in matters connected with property depreciated the value of property was undeniable and self-evident. No better proof of the necessity of taking some steps to remedy the existing state of things as to titles and mortgages in India could be given than the well-known fact that the

wealthy and powerful Land Mortgage Bank (Credit Foncier Indien) had, after some years' experience, to give up lending money on land in India, because the titles and the law and procedure as to mortgages were in so unsatisfactory a state that the high interest obtained did not cover the risk.

Taking up the present Bill, the Council would find it divided into chapters.

Chapter I called for no special remark on this occasion, except that Bombay had been exempted for the present from the operation of the Bill. This exemption was made in consequence of the Bombay Government applying at a very late period to be exempted. It had been granted by the Executive in accordance with instructions from the Secretary of State not to introduce the Bill at once into the territory of any Local Government which objected to it. But Mr. Evans saw no materials before the Council which would lead him to doubt the suitability of the Bill to the civilised portions of the Bombay Presidency.

In Chapter II, several rules were introduced from the Succession Act, 1865, defining the limits within which property could be tied up by settlement *inter vivos*, and laying down the rule restricting perpetuities. He had always been apprehensive that these rules would unduly extend the powers now possessed by Hindus (under the rule in the Tagore case) of tying up the properties after their deaths.

The rule in the Tagore case, which prohibited gifts or bequests to unborn persons, was now the Hindu law as declared by the highest tribunal, except so far as the rules now proposed to be embodied in the Act had been made applicable to the wills of Hindus in Bengal by the Hindus Wills Act, 1870.

The Hindu Wills Act was passed before the Privy Council had finally laid down the doctrine that no interest could by Hindu law be created in favour of an unborn person, which doctrine, as they pointed out, obviated the necessity for any rule against perpetuities under Hindu law, and also explained why no such rule could be found in the Hindu law. How far the Hindu Wills Act did in fact abrogate, in the case of wills in Bengal, the rule in the Tagore case was a disputed point now in course of settlement by the Courts. It appeared to him that the question, whether extended powers of tying up property should be granted by legislation to Hindus, was one of grave public policy not to be lightly settled.

Mr. Evans' difficulties on this point had been removed in a singular manner. The Hon'ble Maharaja Jotindra Mohan Tagore and the Hon'ble Raja Siva Prasad, conceiving, in common with many of their fellow-countrymen, that the rule in the Tagore case did not correctly represent the Hindu law, and that Hindus were by their own law empowered to tie up their property forever without any restriction, had rejected the extensive powers conferred upon them by the Bill as too limited, and had asked that a clause should be added to Chapter II, providing that nothing contained in that chapter should affect any rule of Hindu law. As the effect of this was to leave this important question as it stood for the present, and to give an opportunity for its full consideration in future, he had gladly acceded to the proposed amendment, though regarding it from a different point of view from that taken by its proposers. For his part, he would sooner repeal the corresponding sections in the Hindu Wills Act, and stick to the rule in the Tagore case, with an exception in favour of bequests to, or settlements on, unborn children of a Hindu daughter to take effect on the death of the daughter.

The difficulties arising from settlements of land in England should make the Council chary of extending the existing powers of settlement in India.

The chapter on sales of immoveable property provided for written instruments and registration, and laid down rules as to the rights and obligations of buyer and seller.

He had not heard much objection to these latter, but there had been a cry raised against the supposed hardship of requiring writing in the sale of land. Speaking of the civilised parts of Bengal, and excluding any wild tribes who might be ignorant of the art of writing (and who would, as a matter of course, be exempted by the Local Government), he could safely say that his experience, and all the enquiry he had been able to make, led him to believe that this objection was purely visionary, as, in practice, all sales of land of the value of Rs. 100 or upwards were always evidenced by a written document.

On the policy of insisting on writing and registration in order to avoid confusion and uncertainty in titles, Mr. Evans need not dwell. The chapter on mortgages was the most important in the Act. The law relating to mortgages urgently called for definition and practical amendment.

Mortgages were legislated for in Bengal as early as 1798, but, as the old Regulations gave a somewhat cumbrous and unsatisfactory procedure, and did not cover every class of mortgage, money-lenders had resorted to a simple mortgage-bond, consisting of a covenant to pay and a pledge of the property. This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree, and sell up the mortgaged property without allowing any time for redemption. The sale being an ordinary execution-sale of the right, title and interest of the debtor, whatever it might be, it was usual when the same property was pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave the purchasers to fight out in court the question of what they had bought under their respective sales. There being no machinery for bringing together into one suit the various incumbrancers on the property, endless confusion had been the result, and the decisions of the courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch any thing like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered.

It had been one of the objects of this chapter to remedy these and other similar evils. Mr. Evans hoped some day, when our registration system was improved, to see a much greater change, and to see incumbered land sold under a statutory title, leaving all disputed questions to be fought out over the proceeds in court. But, pending this, it was very necessary to do something, and what was done by this chapter would be expected, remedied, or at least ameliorated, many of the existing evils.

It had been proposed to legalise powers to the mortgagee in the *Mufassal* to sell without the intervention of the court. He was strongly of opinion that these powers, which were practically unknown in the *Mufassal* of Bengal could not be safely granted except where the property was situated in the Presidency-towns or the parties were Europeans. There had been some doubt as to the validity of such powers. This chapter dealt with this vexed question

as he thought, satisfactorily. He should have preferred to see equitable mortgages abolished altogether, or at least confined to land situated within a Presidency-town. They produced great confusion in the case of land in the Mufassal, and frustrated the effects of registration.

There was little to be said of the remaining chapters except that they made very little change in the existing law, and that the small changes made seemed desirable.

It could not be expected that a work of this kind should be free from errors, imperfections and omissions ; but it had now been very long before the public, and a great mass of valuable criticism had been received, which had led to many alterations from time to time.

Very probably this Act, like many other Acts, would in time be altered, amended and improved as necessity arose and flaws were discovered in its working. But, after undergoing consideration and criticism for five years, it was not likely to be further materially improved, unless it was subjected to the test of being worked.

The Hon'ble **MAHARAJA JOTINDRA MOHAN TAGORE** said that having signed the Report of the Select Committee without dissent, he deemed it necessary to say a few words before the Bill was passed into law. In his opinion, a measure of this kind, to be complete, should, as far as practicable, embrace, within the scope of its operation, all sections of the community, and this, he thought, was the original intention when the Bill was first framed ; but unfortunately, as far as some of its provisions affected the Hindus, the Bill simply gave the sanction of law to certain principles which were laid down by the Courts of Justice in later days ; but these decisions, the Hindus contend, were not only based upon erroneous constructions of their law, but were also opposed to the rulings of equally high authorities of an anterior period. Some of these modern decisions imposed upon the Hindus disabilities which, he thought, no other nation in the civilised world laboured under ; others, again, were so much in accordance with the theories of English law, that they might be said not to interpret Hindu law as it was, but what according to the advanced notions of modern jurists, it ought to be, and, naturally enough, they ran counter to the thoughts, feelings and ideas of the Native community. He represented this to the members of the Select Committee, and though they were most anxious to preserve Hindu law in its integrity, they were disposed to accept the later decisions of the courts as containing the true exposition of that law. On the other hand, the Hindu community held as strongly that these decisions, as he had stated, were based upon a misconception of the true spirit of the law, and in this opinion they were supported, not only by the learned Pandits of all parts of the country, but also by no less an authority than that eminent Sanskrit scholar, Gold-stucker, who, as was well known, had declared that many of the translations of the texts of Hindu law were inaccurate ; and therefore, he submitted, many of the decisions founded on these incorrect translations were necessarily inaccurate. He and his hon'ble friend Raja Siva Prasad had brought these circumstances to the notice of the Select Committee, and took the liberty to point out the extreme hardship and injustice to which that community would be subjected should the legislature seal with its sanction those principles to which such strong objection was taken. To institute, however, proper inquiries and to arrive at correct conclusions must necessarily be the work of a long

time. It had, therefore, been agreed, as an alternative course, to exclude the Hindus, Buddhists, &c. from the operation of many of the provisions of the Bill. The effect of this would be that, when the Bill would be passed into law, it would not interfere with many of those disputed points of Hindu law as it was at present administered, though it must be observed that it would leave those points in a very unsettled and unsatisfactory state, to be dealt with from time to time by particular judges according to the light that might be in them, with the chance of those recent decisions which had overridden the rulings of a former period, being upset in their turn by other decisions at a future time, until the legislature stepped in and, after the fullest and most careful enquiry, determined and laid down principles in accordance with the true spirit of Hindu law, and in consonance with the wants, wishes and feelings of the Hindu community whom they most concerned, and adapted as well to the condition of Indian society.

The motion was put and agreed to.

The Hon'ble Mr. PLOWDEN said that he did not intend to occupy much of the time of the Council, but he was afraid he should have to trespass upon their patience at some length. He would, however, be as brief as he could possibly be, and, for this and other reasons, he was not going to enter into any elaborate criticism of the Bill in its legal aspect. First of all, he had not the legal knowledge which would enable him to give an opinion deserving of the attention of the Council on the subject; in the next place, even if he had the ability, he had not had the time to go thoroughly into an exhaustive criticism from this point of view; and, lastly, the Council has now before them the opinions of certain experts in the law, by which members of the Council could determine what the value and merits of the Bill might be. He must confess that he was somewhat surprised to find that, in the voluminous papers which had been circulated in connection with the several Bills which embodied this measure, and the history of which had been given to them by the hon'ble member in charge of the Bill, amongst the opinions of these experts there was an extremely valuable opinion, all reference to which had been omitted, and that was the opinion of Sir Fitz James Stephen. His opinion was that of a competent expert, and he gave his opinion in reply to a special call of the Government of India on this Bill and five other codifying Bills of the Indian Law Commission. Mr. Plowden supposed that nobody could deny that great weight and great value should be attached to any opinion given by such an eminent authority, and he should like to know what would be thought of the opinion which he found recorded before him. He would read the opinion of that very eminent jurist, which was given in 1879, in respect of the present Bill. He said:—"I am still however, by no means satisfied that any part of this Bill is really wanted in India, except, perhaps, the chapter on Mortgages and, possibly, the chapter on Leases." He would now request the Council to turn to the Bill No. VII, now before them, and if they looked at it they would find that, in addition to those two chapters which Sir James Stephen did not disapprove of, there were no less than five other chapters, and of these, four were absolutely identical with four of the chapters contained in the Bill which was submitted to him for consideration and of which he did not approve. Mr. Plowden also saw a note the other day, which he supposed was the same which had been just referred to by the Hon'ble Member in charge of

the Bill, and which contained the opinion of the Hon'ble the Chief Justice of the Calcutta High Court; and what did the Chief Justice say? The Council had heard that Sir Richard Garth was in favour of the Bill, and Mr. Plowden concluded he was, as the Hon'ble Member in charge of the Bill said so. But he did not gather from what he saw of that opinion, that the Chief Justice was absolutely in favour of that Bill. Sir Richard Garth said in effect that he could not say he quite approved of the principle of the Bill as it had been framed. It went far too much into details, and would perplex Mufassal judges in the consideration of many difficult questions. Mr. Plowden referred to these opinions simply because he had heard it stated lately that there was no opposition to the passing of this Bill on the evidence of experts, except the single-handed opposition of Mr Justice Cunningham. He thought, from the extract which he had just read from Sir James Stephen's opinion, that he was justified in saying that this was not the case; for here was a very competent man, able to give a valuable opinion, and he was not of opinion that the Bill was absolutely required. Mr. Plowden would not enter at any length into the remarks of Mr. Justice Cunningham. He thought that, to some extent, there was great misapprehension in parts of what Mr. Justice Cunningham said. At the same time, he thought that there were other portions of his remarks which required serious consideration before passing this measure, more especially his remarks on section 54 of the Bill. Mr. Cunningham said, in reference to that section:—"The rule making registration in the case of every transfer of an intangible interest, though below Rs. 100. compulsory, is a serious change in the law, and, however expedient, should not be introduced without the fullest notice to the classes concerned. Every such change is an opportunity of fraud upon the ignorant classes."

Mr. Plowden had listened with great interest to the observations which had fallen from Mr. Crosthwaite, to the effect that this bill was needed. As he (Mr. Crosthwaite) was thoroughly acquainted with the state of affairs amongst the agricultural population of the North-Western Provinces and the Central Provinces, he must be aware that these opportunities of fraud had arisen in other cases, and had been attended by singularly unfortunate results. There was a time when agricultural leases were not necessarily registered; then there came an alteration of the law, and from that time leases from year to year, or a term of years, were obliged to be registered. Notice of this change in the law was not given so much as it should have been to the large agricultural community in the North-Western Provinces and other places, and, sitting as a member of the Revenue Board for the North-Western Provinces, and as a Commissioner, he had found cases in which a landlord and tenant had been quite happy under an unregistered lease, and for some time that lease had been acted upon by both parties. But all of a sudden, the landlord wanted to enhance his rent; the tenant would not agree, and then the landlord turned round and said "Your lease ought to have been registered." He brought a suit into court and he gained it because the lease was not registered, and the tenant could not contest his claim. Then there was another section in Mr. Justice Cunningham's remarks to which he would refer.

His Honour the Lieutenant-Governor here observed that he understood from His Excellency just now that Mr. Plowden's motion was to be confined to the postponement of the passing of the Bill: he submitted that he was not in order in commenting upon its general provisions.

His Excellency the President said that he was of the same opinion ; but, at the same time, he thought it fair to Mr. Plowden to allow him to establish the grounds on which he rested his motion.

Mr. PLOWDEN said that, if that was the case, he was perfectly willing to drop further discussion on this part of the question ; it was not to the legal aspect of the Bill that he took exception ; that was altogether another question. But he was bound to allude to another point, which had an important bearing upon the question which would shortly come before the Council, namely, that this Bill do pass. To make his remarks clear he must digress. The motion now against his name on the notice-paper was not that he had intended to move. As originally drafted, it stated his wish that the Bill should be considered again when the Council re-assembled in Calcutta. That would give a clear period of eight months, in which certain events which he would call attention to might occur. Though the motion was placed on the list of business circulated on Monday in that shape, he had subsequently ascertained from the Secretary in the Legislative Department that, in his opinion, he (Mr. Plowden) was out of order in bringing forward such a motion ; and, accordingly, he changed the form of the motion to that in which it stood at present, and he hoped it would answer his purpose. His object, briefly stated, was to secure a further reasonable period of time within which endeavours might be made to elicit from the representatives of the Native community a larger expression of their views on the merits of the Bill, particularly in connection with their several local customs and laws. It was not his wish to obtain further criticisms on the legal aspects of the Bill, though that might be desirable. His motion, as it stood, did not go so far as he wished ; but, if it was assented to, and if, as he hoped, the facts which he had now put forward would justify the Council in accepting it, he could safely leave it to the Executive Government to determine the time which would be necessary to secure to the Bill more extended publicity, and to endeavour to elicit a larger volume of Native opinion than the Council now possessed. The Hon'ble Member in charge of the Bill had dwelt on the publicity which the Bill had obtained. He would turn to that point shortly. The Bill dealt with the every-day transactions of life of a very large community, and would affect, more or less, the affairs of a very large section of their Native fellow-subjects. Every man who had property which he wished to transfer, however small it might be, would be touched by the provisions of the Bill. In these circumstances, when he learnt that the Bill was coming on for final discussion, he made it his business to see to what extent the Bill would affect those interests, to what extent Native opinion had been obtained on it, and how far the Bill had attained practical publicity. With that object he communicated with the Secretary in the Legislative Department, and he pointed out to Mr. Plowden the sources from which he could obtain the information he desired, and subsequently informed him that the number of Native gentlemen who had submitted opinions on this very important measure was 19. It struck him that considering the very large population that the Bill affected that was a very scant expression of Native opinion. If the Punjab and British Burma, to which the Bill was not ordinarily applicable, were left out of consideration, the Council had received one opinion to about 10 millions of people of the country. He did not call that a very large expression of opinion. He never thought for a moment that these 19 gentlemen were the

only Native gentlemen who had given the Council the benefit of their opinions on the Bill, and he thought it was very natural to come to the conclusion that it was only in reference to the last Bill, which was marked No. V, which was circulated at the end of 1879, that these 19 opinions had been collected. So he turned to the sources of information to which he had been referred, and, reflecting upon the whole matter, the result of his inquiry astonished him. There were not 19 but 21 opinions, and that was all. Ever since the Bill had been before the Council in different shapes, the Government had only succeeded in eliciting from 21 Native gentlemen their opinion upon the matter. It was true the Council had opinions from a great number of officials who, from their point of view, were able to give them, but that was not what the Council wanted. They were legislating for a large Native population, and he should like to see what their opinion was on the subject.

There were one or two other points to which he should like to draw the attention of the Council. He found that, of these 21 Native gentlemen, 18 were Government officers; there were, therefore, only three independent views expressed. Then he found that, of these 21 Native gentlemen, five belonged to Bengal, four to Mysore, three to the North-Western Provinces and Oudh, three to Madras, three to the Punjab, which was out of the scope of the Bill, one to Ajmere and two to Sindh. There was not a single expression of opinion as to Bombay, and he therefore congratulated the Hon'ble Member in charge of the Bill that he had been able to exempt Bombay from the operation of the Bill. Well, he had no doubt that he would be met with the argument that it was not a fair measure of publicity to point to the number of Native opinions that had been obtained. In fact, he had been told so. But he did not think that the gentlemen in the Council thoroughly understood what the extent of this publicity was. He would endeavour to make it clear how far the Bill had been published. He was aware that the practice was, in consonance with the standing orders of the Council, that Bills should be translated and published in the Vernacular Gazettes, and he supposed it was assumed, by gentlemen who considered that sufficient publicity had been given to the Bill, that, in consequence of these translations being published, the people got a very fair view of what was going on, and that, if they wished to address the Council with reference to any objections which they might wish to offer, they would have the opportunity of doing so. But he did not think that was at all the case. It was not possible to obtain much publicity by printing Bills in the Vernacular Gazettes. He was only able to ascertain from the printers of the Bengal and North-Western Provinces Gazettes, to what extent the Vernacular copies of the Gazettes were circulated to private individuals. He thought Members of Council here would be somewhat surprised to hear the result of the enquiry he had made so far as Bengal and the North-Western Provinces and Oudh were concerned. He found that the number of private subscribers to the Vernacular Gazettes in Bengal was 174. He also found that in the North-Western Provinces and Oudh the number of Vernacular Gazettes issued to private individuals was 205. They were reckoned in this way: they were 173 private subscribers for the Bengali Gazette, and there was one gentleman who took in the Hindi Gazette. He could obtain no information regarding the Uriya Gazette, but he did not think it circulated more widely than the Hindi Gazette. Then, in the North-Western

Provinces and Oudh, where the Gazette was published in Urdu, 205 gentlemen, some of these might be officials, took in that Gazette. Now, it was a matter of Arithmetic. There was one Vernacular Gazette issued to every 300,000 persons amongst those which were circulated to private individuals; and, if the English copies of the Gazette which were also privately circulated were added, there would be about one to every 170,000. It seemed to be utterly misleading and an abuse of terms to talk of that as publicity. There was only this small number of private persons who took in these Gazettes, and how could it be thought that publicity was obtained for these measures by securing translations of them in the Vernacular Gazettes? Then, there was another point, hon'ble members were not aware at what time these translations were issued. In one case, the Vernacular Gazette—he thought it was the Hindi Gazette for Bihar—was not issued till December; so that it was impossible for a man, however, anxious he might be to pay attention to a Bill of this kind, to give a competent opinion upon it by the 10th of January, which was the time when the Bill was brought forward for final consideration in the Council.

His Excellency the President said that, in the papers before him, he found it recorded that the last issue of the Bill was published in the Hindi Gazette on the 24th September and on the 1st and 8th of October last year. He thought the Hon'ble Member was alluding to the Marathi Gazette, which was the only one in which the Bill was published in December.

The Hon'ble Mr. FLOWDEN resumed. It appeared from the paper before him, which he had received from the Legislative Department, that the Bill was published in the Hindi Gazette, on the 6th of December. He thought therefore, that he had sufficiently pointed out that there had not been real publicity, and on that ground he was anxious that the final consideration of the Bill should be postponed. There was one other point to which he would like to draw attention. He was told yesterday that the British Indian Association asked for time to consider this measure, to enable them to bring forward their objections to the Bill, and they were met with a flat refusal. He would, therefore, move that the Bill as amended by the Select Committee be republished.

His Honour the Lieutenant-Governor said that he had no desire to bring forward any motion which should have the effect of obstructing the passing of the Bill, but he should have been very glad if the Hon'ble Member had seen his way to acceding to a request which he had made to him to postpone his motion for the passing of the Bill. Of course, there might be very strong reasons for pushing on the measure with such extraordinary haste; but these reasons were entirely unknown to any one not belonging to the Executive Council. No reason of any cogency had been assigned to the Council generally. Assuming that such reasons did exist, and that they were strong reasons, he should not make any formal motion in opposition to the passing of the Bill, or urge, in support of his view, rule 29 of the Standing Order of the Council, which provides that the Report of a Select Committee should be in the hands of the Council seven days before a motion is made to pass a Bill. What he desired to say was more in the way of general remonstrance. There was, no doubt, a very strong feeling springing up in the mind of the public, and it was a feeling which he entirely shared, that a number of measures were being hurried through the Council with unwarrantable haste. To prove how very

necessary it was that due time should be given for the consideration of the Reports of Select Committees, and to show the inexpediency of hurrying Bills through Council, it was only necessary to refer to what had occurred since last week in respect to this very Bill. There was a motion on the notice-board at their last meeting that day week for passing the Bill. Fortunately, a strong difference of opinion occurred as to the working of section 69, and this difficulty—and this difficulty only—led to the postponement of the passing of the Bill into law last Thursday. The delay, however, of one week had brought forward such strong opposition to the Bill from Bombay, that, in the Bill as amended this week, Bombay was exempted from its provisions. He had not been favoured with a sight of the Bombay remonstrance, but it was evidently considered to be of such force as to compel the Government to omit Bombay.

The Hon'ble Mr. STOKES explained that, under the general orders of the Secretary of State to exempt any Local Government which objected to the provisions of the Bill, the objections of the Bombay Government were accepted as a matter of course.

His Honour the Lieutenant-Governor replied that that did not affect his position. The objection must have been held to have had some force in it, and to be a substantial objection, or it would not have come within the scope of the Secretary of State's orders. The result any way was, as it always has been of late, when opposition to legislation had been made by anybody or Government, recourse was had to emasculation, and Bombay was left out of the Bill. Then, exactly the same thing happened in respect to the opposition of the Hindus in regard to certain provisions of the Bill. In consequence of the temporary postponement of the passing of the Bill last week, these objections of the Hindus had been discovered to be of importance, though they had been warned before; and a change had been introduced into section 129 which saved rules of Hindu, Muhammadan and Buddhist law. The objections were met, as usual, by the exemption of the protesting class or body, and in this way an attempt was made to disarm opposition. He thought that these facts were enough to show the danger of passing measures such as this in haste, and without giving all classes time to consider the Reports of Select Committees, and, indeed, without giving the Council itself time to consider them. If the Bill had been passed as proposed last week very serious mischief might obviously have resulted. He again appealed to the Hon'ble Member in charge of the Bill to postpone his motion for a few weeks. He entirely sympathised in the very natural desire of the hon'ble gentleman to see measures over which he had spent so much time, and which had caused him much wearisome labour and anxiety, passed into law; but he could still do that before he left the country by the concession of a short delay. He hoped that always in future more time would be given for the consideration of measures after the presentation of the final Report of the Select Committee.

The Hon'ble Mr. RIVERS THOMPSON said that he thought the request made by his Honour the Lieutenant-Governor was a reasonable one, and the concession of further time for consideration would be in accordance with the injunction of the Secretary of State, that not only should these Bills be permissive in their application, but that they should be subjected to the

closest examination before they were placed on the statute-book. No formal, suggestion of this kind had been made in Council at the last meeting, but as regards the proposal now put forward, he was justified in saying that, in fulfilling the desire of the Secretary of State in the matter, the Government were fulfilling their own wish that important Bills of this kind should not be passed with any rapidity, and that they should yield to any reasonable request that further time should be given for the expression of Native opinion and other opinions on it.

The Hon'ble Mr. STOKES said that he had no objection to postpone the motion for the passing of the Bill for three weeks.

His Excellency the President said :—There seems to be a very broad distinction between the suggestion thrown out by my hon'ble friend the Lieutenant-Governor and the motion of my hon'ble friend Mr. Plodwen. That motion is one for delaying the passing of this Bill for a very lengthened period. Most of the observations made by him in support of that motion consisted of criticisms, which may be perfectly just in themselves—though I am not convinced that they are—against the whole mode of procedure of this Legislative Council in regard to the publication of Bills. He says that our methods of publication fail to secure effectual publicity, and that a very small number of persons in the country know what legislation is going on in this Council.

“That, I daresay, broadly speaking, is very true, and even with all the publicity of Parliament and the press at home, I would venture to say that a very small numerical proportion of the people of England know what Bills are passed in Parliament. No doubt, that proportion is very much smaller in this country, and my wish is that the utmost publicity should be given to every measure brought into this Council. But when my hon'ble friend says that these Bills are only published in certain Vernacular Gazettes, and mentions the number of persons who take in those Gazettes, it appears to me that he omits from his calculation the rest of the Vernacular Press. Now, the Vernacular Press, at all events, should be acquainted with those Bills as published in the Gazettes, and if such Bills do not come into the hands of the writers in that press, then I venture to say that those gentlemen do not give sufficient attention to an important part of their public duties. Be that as it may, however, of course, the Government, and the Legislature particularly, can only take certain recognised methods of affording to the public the opportunity of knowing what is going on in this Council, and it rests with the public to avail themselves of that opportunity, or not, as they think desirable. All we can do is to give to the press and the public sufficient means of informing themselves in respect to such Bills as are before this Council, and I confess that I do not at present see how it would be possible to materially change a practice which has been in existence for a very long time in regard to the publication of such Bills.

“If, however, my hon'ble friend Mr. Plodwen will make suggestions with a view to obtaining greater publicity for Bills brought into this Council, we shall be glad to consider them, provided they are such as the Government can adopt.

“As regards this particular Bill, the fact is that leave was given to introduce it on the 31st of May 1877, and that we have now arrived at the 26th of January 1882, which is very nearly five years since the Bill was

introduced. I find that the Bill has been published four successive times in such newspapers or Gazettes as the Local Governments thought fit, and it seems to me that, according to the ordinary and general modes of publication, and to the course followed with regard to other legislative measures during that period, this Bill has had a large amount of publication and has been for an unusually lengthened period before the public. I therefore very much doubt whether any further publication would be likely to elicit any additional opinion regarding the measure. I quite understand the advantage of such a delay as my hon'ble friend the Lieutenant-Governor suggests, because public attention is now directed especially to this matter, and, no doubt, within a period of three weeks, a considerable expression of public opinion, favourable or unfavourable, may be brought forward; and I think it therefore perfectly reasonable to accede to that proposal. On the other hand, I consider that such a proposal as my hon'ble friend Mr. Plowden makes would fail to secure the object which he desires. If, as he proposes, the measure is postponed for another year, the result will probably be that in the interval people will not have attended to it any more than they have hitherto, and that, when it comes up again, at the last moment, they will examine it as a perfectly fresh matter and start all the same objections to it over again.

"Now, I am very sensible of the necessity for affording every opportunity for the expression of public opinion on a measure of this kind; but of course no one can conceal from himself that it is perfectly possible, by postponing the consideration of such a measure till the very last moment and then asking for an indefinite delay, to bring about the same result as would be accomplished by moving for its rejection, or practically to shelve the Bill altogether. I do not for a moment say that this is the case here. Nevertheless, I quite admit that, if a case has arisen for postponement—and my hon'ble friend the Lieutenant-Governor says it has—we ought not unduly to press on the progress of the measure.

"In conclusion, I would only point out that, so far as the discussion upon the Bill has gone to-day—and it has been discussed by men of great talent and large experience—that discussion has been favourable to the Bill as it stands. This debate will be of great advantage to the public; it will guide their opinion in respect to the Bill; it will tend to remove certain impressions which appear to exist in the public mind; and, therefore, though I cannot agree to the motion of my hon'ble friend Mr. Plowden for a lengthened postponement, I am quite willing to agree that the Bill should be postponed for three weeks."

His Honour the Lieutenant-Governor asked the permission of His Excellency the President to say a few words on the question of publicity. Although it was quite possible that only a certain number of the Vernacular Gazettes might be circulated amongst the Native community, the people who really gave publicity to Bills which were introduced into this Council were the members of the legal profession. Those who were most competent to give an opinion were the pleaders of the various courts in the Mufassal; they criticised the Bills and brought them to the notice of the zamindars and others who were their clients. So that really Bills were published to a much greater extent than appeared from the figures which had been given to the Council.

The Hon'ble Mr. PLOWDEN said that, if the passing of the Bill was deferred for a period of three weeks, he was quite willing to withdraw his motion.

The Hon'ble Mr. STOKES wished to explain the circumstances connected with the memorandum of Sir James Stephen which the Hon'ble Mr. Plowden seemed to think had been improperly withheld from hon'ble members. In December, 1878, the Government of India, having determined to appoint a Law Commission, requested the Secretary of State to invite Sir Henry Maine and Sir James Stephen to favour it with their opinion upon four matters, the selection of subjects for codifying, the order in which those subjects were to be taken up, the general arrangement of the Code, and the applicability of its various parts,—matters on which the Government of India had, in May, 1877, fully expressed its views,—in order that that opinion might be laid before the Commission. Accordingly, in July 1879, the Secretary of State sent the Government of India a despatch containing a minute by Sir Henry Maine and one by Sir James Stephen, the latter of which contained, not merely an opinion on the question submitted to him, but also criticisms on the Transfer of Property and the other five Bills submitted to the Law Commission. These minutes were laid before the Commission and carefully considered, and Sir James Stephen's criticisms were, Mr. Stokes thought, sufficiently answered in the second part of its Report. It was not the custom of the Government of India to publish minutes made for such a purpose—certainly in the present case they should not be published without the author's consent; for Sir Henry Maine's memorandum contained a long extract from an unprinted essay of his on the influence exerted upon law by the continental systems of land-registration; and Sir James Stephen's memorandum was hardly calculated to advance that learned judge's reputation. But, if any hon'ble member wished to see those minutes, he could do so at the Legislative Council House. As to Sir Richard Garth's minute, which the Hon'ble Mr. Plowden seemed to think had also been kept back from the Council, all he could say was, that that minute was written last November, that the learned author, with his usual courtesy, sent him (Mr. Stokes) a copy in his private capacity, that the criticisms which it contained had been most carefully considered both by the Hon'ble Mr. Evans and himself, and that some of the changes which it suggested had been made in the Bill. But Sir Richard Garth never sent his minute to the Legislative Department, and must, therefore, be taken not to have wished its publication. He had apparently modified his views as quoted by Mr. Plowden, for Mr. Stokes had the best authority for saying that the learned Chief Justice now considered the Bill on the whole a very good Bill, though, of course, it had its faults, that it was calculated to do much good, and that he hoped it would be passed at once.

As to Mr. Justice Cunningham's opinions, which had been referred to by the Hon'ble Mr. Plowden, Mr. Stokes might add one or two remarks to those made by the Hon'ble Mr. Crosthwaite. Mr. Cunningham asserted that the definition (in section 5) of "transfer" was inaccurate, because "the following sections show that many transfers are to persons not in existence at the time of the transfer" This was not so. Interests might under the Bill be provided for unborn persons, but in such case the transfer was made to living trustees for their benefit. He said that illustration (b) to section 26 and illustration (b) to section 27 were doubtful law. The former was taken from illustration (c) to the Succession Act, section 115, which had been framed by the great judges and lawyers whom he (Mr. Stokes) had mentioned in his former speech; the latter from the illustration to section 117 of the same Act, which again was drawn from the decision, in *Underwood v. Wing*, 4 D. M. G., 633, of Lord Cranworth

assisted by Mr. Justice Wightman and Mr. Baron Martin. Mr. Cunningham, again, said that "no question has been more fully discussed than the position of the mortgagee who has sued on his mortgage and recovered a money-decree The Bill simply ignores the point." He had not, Mr. Stokes feared, read the Bill which he criticised. There was a section (99) solely devoted to this point and settling it, Mr. Stokes ventured to think, in a satisfactory manner. Then, Mr. Cunningham said—"The question, again, as to the interest which passes at a sale in execution of an auction-decree is not free from obscurity;" and took the Bill to task for saying nothing about it. What he meant by a "sale in execution of an auction-decree" was not very apparent. He could hardly mean a sale made under a decree passed by a corrupt judge who had set his decision up to auction. He probably meant an auction-sale in execution of a decree; but to deal with this matter was outside the express scope of the Bill, and should be dealt with, if at all, by an amendment of the Code of Civil Procedure. He said that Chapter VIII was "very inadequate. It lays down no general rule or principle as to transferability of actionable claims." The reason was that the rule was already laid down in its proper place, namely, section 6. Subject to the provisions in that section, clause (b), and in sections 131, 132 and 136, all actionable claims would be transferable except mere rights to sue for a fraud or for harm illegally caused. But Mr. Stokes would not waste the time of the Council by noticing any more of these criticisms.

The Hon'ble Mr. FLOWDEN asked for leave to withdraw the motion that the Bill to define and amend the law relating to the Transfer of Property as amended by the Select Committee be republished.

Leave was granted.

The Hon'ble Mr. STOKES also asked for leave to postpone for three weeks the motion that the Bill, as amended, be passed.

Leave was granted.

The Council adjourned to Thursday, the 2nd February 1882.

CALCUTTA ;
The 26th January 1882.

B. J. CROSTHWAITE,
Offg. Secy. to the Govt. of India,
Legislative Department.

Subsequently on the 6th February 1882, the Bill was formally passed into law. [See Supplement to the *Gazette of India*, February 25th, 1882.]

APPENDIX V.

Abstract of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 and 25 Vic., Cap. 67.

The Council met at Government House, Simla, on Wednesday, the 6th August 1884.

Present :

HIS EXCELLENCY THE VICEROY AND GOVERNOR-GENERAL OF INDIA, K.G., G.M.S.I., G.M.I.E., presiding.

HIS EXCELLENCY THE COMMANDER-IN-CHIEF, G.C.B., C.I.E.

The Hon'ble J. GIBBS, C.S.I., C.I.E.

Lieutenant-General the Hon'ble T. F. WILSON, C.B., C.I.E.

The Hon'ble C. P. ILBERT, C.I.E.

The Hon'ble Sir S. C. BAYLEY, K.C.S.I., C.I.E.

The Hon'ble T. C. HOPE, C.S.I., C.I.E.

The Hon'ble Sir A. COLVIN, K.C.M.G., C.I.E.

The Hon'ble J. W. QUINTON.

The Hon'ble D. G. BARKLEY.

TRANSFER OF PROPERTY ACT, 1882, AMENDMENT BILL.

The Hon'ble Mr. ILBERT moved for leave to introduce a Bill to amend the Transfer of Property Act, 1882. He said :—

“The chief object of the Bill which I am asking leave to introduce is to remove a doubt which has been entertained as to the effect of the exemption clause in the Transfer of Property Act. When this important measure was before the Select Committee, it was apprehended that there were certain classes of the community to which some of its provisions might be unsuitable, and accordingly a power was given to Local Governments, with the previous sanction of the Governor-General in Council, to make exemptions from the operation of particular sections of the Act.

“The sections to which the power of exemption applies are those which relate to transfer by an ostensible owner (section 41); to the mode of effecting a transfer of property by sale (section 54, paragraphs 2 and 3), mortgage (section 59), lease (section 107), and gift (section 123); and to the effect of a power of sale in a mortgage (section 69). And the form of exemption adopted was copied, with some modifications,

from the Indian Succession Act, which enables (section 332) the Government to exempt from the operation of the whole or any part of the Act either prospectively or retrospectively, the members of any race, sect or tribe in British India to whom the provisions of the Act might be considered inapplicable.

"Now, this was an excellent precedent to follow ; but I cannot help thinking that the Select Committee when adopting it, did not sufficiently advert to the difference between the rules of the Succession Act and those of the rules of the Transfer of Property Act to which the power of exemption was to apply. It is easy enough to make a personal exemption from the rules of succession, and to say that some of those rules shall not apply in the case of succession to a particular person or class of persons. But it is not so easy to make a personal exemption from rules which require the observance of certain formalities in the case of a sale, mortgage, lease or gift of land. According to the generally recognised principles of what is called private international law, formalities of this kind are regulated by the law of the place where the property is situate, and are not affected by the personal law of any party to the transaction. What, for instance, would be the effect of saying that a rule which requires the sale of land to be made only by a registered instrument shall not apply to Bhils ! Would it apply where the vendor is a Bhil, or where the purchaser is a Bhil, or where any party to the transaction is a Bhil, or only when all parties to the transaction are Bhils ? So, again, it is only intended to apply where litigation ensues ; and in that case is the intention to exempt the person who wishes to enforce the contract, or the person against whom the contract is to be enforced, or both ? Plausible reasons may be suggested, and indeed have been suggested in the papers which have come before me, for adopting any one of these views ; but I do not think any lawyer could say with complete confidence which of them would be the correct view.

"The difficulty of construing this section was raised very shortly after the Act came into operation by Mr. Elliott, the Chief Commissioner of Assam, who was anxious to exempt from some of the provisions of the Act certain classes of the population under his government, and more especially the wild tribes on the eastern frontier of Assam, but who was not at all sure what would be the effect of his exercising the power of exemption given to him by section 1 of the Act.

"When the question came before me my own opinion was that the best way out of the difficulty would be to make the power of exemption local and not personal, so far at least as it applies to the sections which prescribe the formalities of transfer. Mr. Elliott, however, would have preferred a power to exempt from the operation of those sections not persons or places, but transaction to which members of any race, sect, tribe or class whom it might be desirable to exempt were parties ; and as to sections 41 and 69 (which relate to sales by ostensible vendors, and to powers of sale in mortgages), he did not see why the power of exemption was needed in their case at all.

"I felt bound to admit that a local exemption would not give precise effect to the intentions of the Select Committee, and I shared Mr. Elliott's doubts as to the reasons for including sections 41 and 69 in the exemption clause. And under these circumstances, considering that the Act had so recently come into operation, and that I had not had the advantage of taking part in any of the deliberations which preceded its passing, I thought it was only due to the eminent persons by whom it was framed, and to the Select Committee who had bestowed so much pains on bringing it into its present shape, to take the opinion of Local Governments before proposing any specific amendment in the law.

"The result of the reference to Local Governments has been to elicit a great difference of opinion as to the form which the exemption clause should assume, whether it should be purely local or purely personal, or partly local and partly personal; and further, if it is made personal, whether it should apply where any of the parties to the transaction is a member of the exempted class, or only where all of them belong to that class. But the general effect of this conflict of opinions on my mind is to confirm the view which I had previously entertained, that the best and simplest way out of the difficulty is to make the exemption from the provisions as to formalities of transfer local, and that any other form of exemption would not only give rise to difficult legal questions, but would facilitate forms of fraud which it is the object of the Act to make impossible, or at least difficult.

"In the view that there should be some kind of local exemption, I think I may claim the support of Sir Charles Turner, whose opinion, as that of one of the three Law Commissioners to whom the Transfer of Property Bill was referred, is entitled to great weight, and I am certainly supported by Mr. Justice Muthusami Aiyar, who has written an interesting minute on the subject, and by Mr. Robert Crosthwaite, who was acting as Secretary in the Legislative Department when the Bill was before the Select Committee, and who may therefore be presumed to be acquainted with the reasons which induced them to insert the exemption clause now in the Act.

"As to the extent of the local exemption, one point appears to be clear, namely, that the sections prescribing the formalities of transfer should not extend to tracts of country in which the Registration Act is not in force. The sections in question presuppose the existence of a Registration Law, and are scarcely intelligible without it; and it can, I think, only have been through an oversight that they were extended to areas where that act is not in operation.

"Should we go further, and exempt from the operation of those sections any part of the country where the Registration Act is in force? Sir Charles Turner appears to doubt whether we should, and suggests, as an alternative, that the kind of protection now afforded to certain classes of agriculturists under the Dekkhan Relief Acts should be extended to other classes of persons, by making them incompetent to convey any interest in land by a written instrument unless the instrument

is executed in the presence of an officer of Government, who should be required to explain its effect. In other words, instead of relaxing formalities in the case of these classes he would require the observance of additional formalities. With all deference to his high authority, I think the balance of argument is against the adoption of this suggestion. In the first place, any attempt to superadd a personal to a local exemption is open to the objections which have been urged against granting purely personal exemptions. In the next place, although I do not deny that members of uncivilized and ignorant classes are exposed to risk of fraud when they engage in transactions with persons of superior intelligence, though perhaps not of superior morality, yet there does not appear to be anything which shows that this particular risk was in the view of the Select Committee when they framed the exemption clause now under consideration. There may be, in my opinion there are, cases in which a contract should not be legally binding, unless it is executed under sufficient safeguards against fraud. The English Legislature has recognised this principle in its legislation on the subject of bills of sale (to select one out of many instances), and English Courts of equity constantly act on it where such relations exist between the parties as afford ground for the presumption of undue influence having been exercised. But such cases, as the illustrations which I have referred to clearly show, are not confined to transactions relating to land, or to transactions to which one of the parties is a member of an uncivilized race; and on the whole I think it is best to deal with them, not in the manner suggested, but by special legislation, where the need for such legislation is shown to exist.

"On the other hand, I think that it would be convenient to have a power of exempting from the operation of some of the provisions of the Act certain tracts to which the Registration Law extends. For instance, Sir Henry Ramsay has strongly pressed upon me the expediency of exempting Kumaun, where I believe the Registration Act is in force. I am quite aware that the Transfer of Property Act is not the only Act of the Legislature which Sir Henry Ramsay has desired to exclude from Kumaun, and I fully understand the jealousy with which legislation of the kind is regarded by a man whose long and eminently successful administration affords one of the most conspicuous instances of what may be done in a backward district by a strong, conscientious and capable ruler when left very much to his own devices and untrammelled by laws and regulations. But without committing myself to Sir Henry Ramsay's views on legislation generally it does seem to me probable that there are tracts of country where the mass of the population are not ripe for those provisions of the Transfer of Property Act which require all transfers of property above a certain value to be in writing and registered, and which in the case of petty transactions make writing obligatory unless the transfer is accompanied by delivery; and this appears to be the opinion of the Government of the North-Western Provinces, who desire to have the power of exempting certain tracts of

country within the area under their administration, including, I believe, not only Kumaun, but certain other hill tracts. The amending Bill proceeds on the view that such a power is advisable, and proposes to give a power to grant local exemptions from those sections which prescribe the formalities of transfer.

"The power will doubtless be cautiously exercised, and I should point out that it may be so exercised as to exclude certain portions from the exempted area. For instance, provisions which may be considered unsuitable to Kumaun generally, may be suitable enough to Naini Tal.

"This is all that I need say at present about sections 54, 59, 107 and 123, the sections which prescribe the formalities to be observed in cases of sale, mortgage, lease and gift.

"To sections 41 and 69 different considerations apply. Section 41 enacts that a transfer of property by its ostensible owner shall not be void by reason only that the transferor was not authorized to make it, provided that the transferee after taking reasonable care to ascertain that the transferor had due powers has acted in good faith.

"This section is based on the principle that where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud, and that in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than he himself possesses. This principle is generally recognized in the jurisprudence of all civilized nations, and lies at the bottom of such legislation as the English Factors' Act; but I am inclined to agree with Sir Charles Turner in thinking that it involves a refinement of equity which is perhaps hardly required for, or suitable to, the very simple transactions between members of uncivilized races, and which they might fail to appreciate. Accordingly I propose to give power to exempt from the operation of this section any property within a particular area in which a member of any specified race, sect, class or tribe is interested. As the section deals not with the formalities of transfer, but with the capacity to transfer, the objections to a form of exemption which is to some extent personal do not apply.

"As to section 69, there does not seem to be any reason why it should be included in the general exemption clause; but, on the other hand, it does seem to require amendment in itself.

"The object of the section was to set at rest what had been previously a moot question, namely, whether, under the law of British India, a mortgagee could sell under an express power of sale without the intervention of the Courts. The section says that such a power of sale shall be valid in certain cases, namely:—

(a) Where the mortgage is an English mortgage (i.e., in the ordinary English form), and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist;

(b) Where the mortgagee is the Secretary of State in Council;

(c) Where the mortgaged property or any part of it is situated within the town of Calcutta, Madras, Bombay, Karachi or Rangoon ;

but it does not go on to say that the power shall not be valid in other cases.

"I propose to make clear what seems on the whole to have been the intentions of the framers of the section by declaring the cases in which the power of sale is not to be valid. And as Mr. Justice Muthusami Aiyar has pointed out that there are other classes which it is even more necessary to exclude from the operation of the exceptional provision than Hindus, Muhammadans and Buddhists, I propose to add words giving a power to exclude such classes.

"These are the principal amendments which I propose to make in the Act. There is, however, one further amendment, which, though of minor importance in itself, opens up questions that are of considerable importance.

"There is a section in the Act which declares that nothing in the Act is to be deemed to affect the provisions of any enactment not thereby expressly repealed. And Mr. Elliott asked how this declaration was to be reconciled with certain sections which appeared to him to affect the provisions of the Registration Act. Under the Registration Act certain instruments relating to property of less than Rs. 100 in value may be registered, and, if registered, have priority over unregistered instruments. Under section 54 of the Transfer of Property Act all instruments of sale must be registered to have any effect at all. Where the value of the property is less than Rs. 100, you may sell by mere delivery ; but if you wish to rely on a written instrument, you must register it ; and the question is whether the latter of these provisions does not affect the former. The answer depends on the meaning which you attach to the term 'affect.' As used in legislative language, it usually means affect in *malam partem* derogate from wholly or in part. In this sense the Transfer of Property Act does not affect the Registration Act. What it really does is to supplement it by rendering certain instruments compulsorily registrable which were only optionally registrable before. And I propose to insert in the amending Bill words which will make this clear.

"Now this is, as I have said, a minor matter, but it raises the question as to the relations to each other of these two important Acts, and as to the extent to which the passing of the Transfer of Property Act has superseded the necessity for making some of the amendments which have from time to time been suggested in the Registration Act.

"The Registration Act is an Act which has been frequently tinkered, and which from the nature of the case it is almost impossible to make thoroughly satisfactory, and therefore I am not particularly anxious to undertake the task of further amending it. But I fear that it will be necessary before long to take action on the suggestions for its amendment which have for some time been pressed on the Legislative

Department, and the close connection of some of those suggestions with the parts of the Transfer of Property Act which I am proposing to amend will, I think, afford a sufficient justification for my referring to them briefly now.

"One of the proposals which has been laid before us is pretty radical in its character, for it goes to the root of the matter, and suggests that our whole system of registration is wrong, and that what we ought to aim at is a registration, not of instruments or documents but of titles. Now this question of registration of instruments or assurances *versus* registration of titles has been the subject of controversy in England among those learned in the conveyancing craft during the last half century or so. On the one hand, a system of registering assurances has been in force in two counties in England—Middlesex and Yorkshire—ever since the reign of Queen Anne, and has also been in force for a long while in Ireland and Scotland, and has worked with more or less success. In Middlesex I can undertake to say that it has worked very badly. On the other hand, Sir Robert Torrens has introduced into the Australian colonies a system of registering titles which appears to have been a conspicuous success, and which has therefore naturally suggested the expediency of its introduction elsewhere. Both Lord Westbury and Lord Cairns have passed Acts providing for registration of titles somewhat on the Torrens' system; but both these Acts, though framed with great ability, have, I am sorry to say, remained almost dead-letters. It has been suggested that in India a system of registering of titles might be conveniently engrafted on the system of revenue registration, which looks rather to the man in possession than to the way in which he got into possession, and that we should thus avoid the double system of registration under the Revenue Acts and under the Registration Acts.* My own opinion, however, for what it is worth, is that, though registration of titles is preferable in theory to registration of assurances, it is not compatible with a complicated system of titles. It is mainly for this reason that I believe it has failed in England, where titles are complicated by settlements, and I fear that it would fail in India, where there are even greater complications arising out of Hindu family law.

"Our present system of registering instruments has obtained firm possession of the field, has on the whole worked fairly well, and is recognized as the basis of such important pieces of legislation as the Transfer of Property Act; and under these circumstances it would be a strong measure to upset it altogether whether an economy may not be effected by combining the functions of the staff employed under the Revenue Acts and of that employed under the Registration Acts is an administrative question into which I need not enter.

* This suggestion has the support of Mr. Justice Field, see "Landholding and the Relations of Landlord and Tenant," p. 405, note 9.

"Assuming then that instruments and not titles are to be registered, there is a feature of the existing Registration Act to which strong exception has been frequently taken by high authorities, and that is what is known as optional registration, the system, namely, under which instruments of a certain class are allowed, but not required to be registered, are given a legal effect without registration, but, if left unregistered, are liable to be overridden by a registered instrument of later date. Sir Richard Garth has repeatedly inveighed against the system as inducing and facilitating fraud, and a high authority on the other side of the Peninsula has recently used equally strong expressions about it. 'The present law,' says Mr. Maxwell Melville in a note which I read the other day, and which I hope he will excuse me for quoting in this connexion, though it was written with reference to a different subject, 'which makes the registration of certain instruments optional, but invalidates them when they come into competition with registered instruments of a later date, is a trap for the unwary, and has unfairly deprived thousands of innocent mortgagees and private owners of their property.

"Among the numerous difficult questions to which the system of optional registration has given rise, one of the most difficult is as to the effect of notice of an unregistered transaction on the rights of a person who claims under a registered instrument. There is a section of the Registration Act (section 50) which says that when a deed of which the registration is optional is registered, it shall have priority over any unregistered deed relating to the same property. This is in fact the inducement to register such deeds. But supposing that a man who claims under a deed so registered had, at the time of entering into the transaction on which the deed is based, notice of the existence of another unregistered deed, earlier in date and inconsistent with his claim, what then? Is he still to have priority, notwithstanding the notice? On this question there is a vast number of decisions, which are collected in the various editions of the Registration Act (the edition which I happen to have consulted is a handy little book brought out this year by Mr. Cuddalore Ramachandra Aiyar, a subordinate Judge in North Malabar), but the upshot of them is that the Madras High Court would allow the claimant under the later registered deed to assert his priority, notwithstanding notice, whilst the other High Courts, and I believed the Chief Court of the Punjab, hold the opposite view. I have had some correspondence on this subject with Sir Charles Turner, and he has been kind enough to send me a note, in which he has reviewed the history of the successive Registration Acts, and has defended with much force the view taken by the Madras High Court as to the operation of the present Act. I quite agree with him that if the doctrine of notice is carried to the extravagant lengths to which it was formerly carried by English Courts of Equity, and under which what was called constructive notice was made to include, not only what a man actually knows, but what he and various other persons connected with him could, should, or might have known,—I quite agree that if

the doctrine is carried to this length, it is fatal to any system of registration. But a much more reasonable view of what amounts to notice has been taken of late years by the English Courts, and notably by Lord Cairns in a well-known case in the House of Lords (*Agra Bank v. Barry*). It is certainly desirable, as Sir C. Turner admits, that the law administered in the several provinces should be made uniform by legislation, and that it should be expressly declared whether the doctrine of notice is to be applied by the Courts, and if so, to what extent. It may be found possible so to define the term for the purpose of the Registration Act as to get rid of what is called constructive notice, and to confine the doctrine to cases where there is such a knowledge of a previous transaction as shows that the person claiming under a subsequent registered deed is obviously trying to take advantage of his own fraud; but the work of framing a definition which would draw the line precisely at the right point would be a matter of considerable difficulty.

"In the meantime it should be borne in mind that we have already in our Statute Book a definition of notice and a declaration of its legal effects. The definition section of the Indian Trusts Act (section 3) explains that a person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to, or obtained by, his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229. And the Act goes on to enact (section 91) that—

'Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.'

"I am not aware whether the effect of this section on the Registration Act has been fully considered; but it certainly cannot be left out of account in any legislation which may be necessary, and I fear legislation will be necessary, to reconcile the conflicting decisions of the High Courts.

"Of course if you could get rid of optional registration altogether, many of the difficulties to which I have referred would vanish. And I understand Sir Richard Garth* to be of opinion that, so far as transfers by sale are concerned, the evils arising out of optional registration have been removed for the future in those parts of India to which the Transfer of Property Act already extends, and are capable of being removed by a simple extension of that Act to other provinces, such as Bombay, to which the Act may be extended by the Local Government. For, under section 54 of the Transfer of Property Act, there is no such thing now as a transfer by writing of immoveable

* See his remarks in *Narain Chunder Chuckerbutty v. Dattaran Roy*, I. L. R., 8 Cal., at p. 612.

property unless that writing is registered. There may be an oral transfer by way of sale of a possessory interest under Rs. 100 in value, but any sale in writing whether under or over Rs. 100, must be registered. However, leases and mortgages stand on a different footing, and as to them the law of optional registration still prevails.

"The remedy which is usually suggested is to extend the range of compulsory registration to instruments relating to property of less than Rs. 100 in value. The chief objection to this proposal appears to be that the obligation to register petty transactions would impose great expense and hardship in cases where a registry office is not available within a reasonable distance. There may be—I daresay there are—parts of the country to which this objection would not apply, and the suggestion which I should be disposed to make is that the Registration Act should be amended in such a way as would empower Local Governments to make registration of small transactions relating to land compulsory in those areas in which, in their opinion, the people are prepared for general registration and there is machinery available for registering such transactions without unnecessary expense and inconvenience to those concerned. In this way the range of compulsory registration might be carried out in a gradual and experimental manner. Of course the registration fees charged on petty transactions would have to be very light."

"And it is worth considering whether, in the class of cases to which compulsory registration is considered inapplicable, we should allow an unregistered instrument to have any legal effect whatever, whether in fact we should not extend and generalize the principle which I understand to be embodied in section 54 of the Transfer of Property Act.

"These points will have to be fully worked out when the Registration Act comes up for amendment; but I suggest them for consideration now, because of their close and obvious connexion with the enactment which I am asking the leave of the Council to amend."

The motion was put and agreed to.

SIMLA,
The 8th August 1884. }

(Sd.) D. FITZPATRICK,
Secretary to the Government of India,
Legislative Department.

Afterwards on the 30th January 1885 the Hon'ble Mr. Ilbert moved that the Report of the Select Committee on the Bill to amend the Transfer of Property Act, 1882, be taken into consideration. He said:—

"This is another Bill for amending one of the codifying Acts, and its main object is to give a more workable form to the power of exemption which is contained in one of the introductory sections of the Transfer of Property Act.

"I explained so fully on the occasion of obtaining leave to introduce this Bill the reasons which made some amendment of this section necessary, that I need not recapitulate them now, and I will content myself with stating the conclusions to which the Select Committee have come as to the form which the amendment should assume.

"With regard to the exemption from those sections which require certain instruments to be registered, we are clearly of opinion that the exemption should be local, as proposed by the Bill.

"Then comes the power to exempt from section 41, which deals with transfers by ostensible owners. With regard to this section, there is much difference of opinion among those whom we have consulted, first, as to whether there should be any exemption from this section at all, and then as to the form which the exemption, if any, should assume. The conclusion to which we have come is that the section merely embodies a rule of equity which the courts should follow, and which they probably would follow, even if it were not expressly enacted by the Act. We think, therefore, that it should be in force wherever the Act is in force, and that no power to exempt from it is necessary or desirable.

"The last clause of the Bill as introduced related to a section which declares in what cases a power of sale or a mortgage is to be valid—a section which was the subject of much discussion at the time when the Transfer of Property Bill was being framed, and with respect to which the views of the Law Commission, to whom the Bill was referred at an early stage, were not identical with those which ultimately prevailed in the Select Committee of this Council and in the Council itself. The conclusion of the Committee and the Council was that such powers of sale should be declared valid only to the extent to which they were previously valid in accordance with general usage. And to give effect to that view the Bill made the power of sale valid in cases where the mortgage was a mortgage in the English form and neither the mortgagor nor the mortgagee was a Hindu, a Muhummadan or a Buddhist, and also in cases where the mortgaged property was situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon. Whether the particular conclusion at which the Committee and the Council then arrived was right or not, I do not propose to discuss. There is a great deal to be said on both sides of the question, but the Select Committee on the present Bill thought they ought not to re-open the discussion or to alter the general lines on which the section is framed. We think it will be sufficient so to amend it as to make its meaning clear and its provisions more logically complete.

"In the course of the discussions on the Bill it was suggested to us that one of the sections of the Act might possibly be so construed as to impress the character of transferability on those occupancy rights and other similar interests in land which by existing law or custom are not transferable. It was certainly not the intention of the framers of the act to make by it any change in the law on this point, and we have added to the amending Bill a clause for the purpose of removing any doubts on this head."

The motion was put and agreed to.

The Hon'ble Mr. Ilbert also moved that the Bill, as amended, be passed.

The motion was put and agreed to.

APPENDIX VI. GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

THE following Bill was introduced in the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 14th July, 1899 :

No. 14 of 1899.

[NOTE.—The italics indicate the alterations suggested in the existing Chapter VIII of the Transfer of Property Act, 1882.]

A Bill to amend the Transfer of Property Act, 1882.

WHEREAS it is expedient to amend the Transfer of Property Act, 1882 ; It is hereby enacted as follows :

Short title and commencement.	1. (1) This Act may be called "The Transfer of Property Act, 1899 ;" and
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(2) It shall come into force at once.

Substitution of new Chapter for Chapter VIII, Act IV, 1882.	2. For Chapter VIII of the Transfer of Property Act, 1882, the following Chapter shall be substituted, namely :
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"CHAPTER VIII.

"OF TRANSFERS OF ACTIONABLE CLAIMS.

"General.

"130. (1) A claim which the Civil Courts recognize as affording grounds for relief is actionable, whether a suit for its enforcement is or is not actually pending or likely to become necessary.

(2) *Every actionable claim may be transferred subject to the restrictions and conditions imposed by Chapter II and by this Chapter.*

Transfer of debts.	"131. No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, <i>unless the transfer is in writing and unless and until</i> express notice of the transfer is given to him, <i>save where</i> he is a party to the transfer ; and every dealing by such debtor or person (not being a party to, or not having received express notice of, the transfer) with the debt or property shall be valid as against such transfer.
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Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance or to a mortgage effected by deposit of deeds or securities.

"137. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

"138. Nothing in the foregoing sections of this Chapter applies to stocks or shares or to instruments which are for the time being by law or custom negotiable, or to any mercantile document of title to goods.

Explanation.—The expression "mercantile document of title to goods" includes a bill of lading, dock warrant, warehouse-keeper's certificate and delivery order, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possession of the document to transfer or receive goods thereby represented.

"Restrictions on sale of actionable claims which are in controversy.

"139. (1) Where an actionable claim which is in controversy, is sold, he, against whom it is made, is wholly discharged, by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

(2) Nothing in sub-section (1) applies—

- (a) where the sale is made to the co-heir to, or the co-proprietor of, the claim sold ;
- (b) where it is made to a creditor in payment of what is due to him ;
- (c) where it is made to the possessor of a property subject to the actionable claim ;
- (d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

"140. No Judge, legal practitioner, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim which is in controversy and could be enforced by suit in the Court where he exercises his functions."

3. So much of the Policies of Insurance (Marine and Fire) Assignment Act, 1866, as is unrepealed, and so much of the Indian Short Titles Act, 1897, as relates thereto, are hereby repealed.

STATEMENT OF OBJECTS AND REASONS.

Chapter VIII of the Transfer of Property Act, 1882 (IV of 1882), aims at dealing comprehensively with the difficult question of the assignment of choses in action and includes an excursion into the law of

champany and maintenance. The attempt has not been altogether successful. Many difficulties in the construction and practical application of the Chapter have arisen ; its provisions have been the subject of numerous and conflicting rulings of the various High Courts ; and the necessity for legislation has been made clear. The present Bill has been drawn with the object of removing the defects which have, from time to time, been detected, and its details will be found fully explained in the annexed NOTES ON CLAUSES.

2. It has been suggested that a special provision on the subject of champany and maintenance should be included in the Bill ; but, if such legislation is to be undertaken, it is thought that it should take the form of an amendment of the Indian Contract Act, 1872 (IX of 1872)—the addition, possibly, of an *Explanation* to section 23, which avoids contracts opposed to public policy.

The 12th July, 1899.

T. BAILEIGH.

NOTES ON CLAUSES.

CLAUSE 2 OF BILL.

Proposed new section 130, Act IV of 1882.—Probably section 130, as it stands in the present Act, may be taken as a fair working definition of the term *choses in action* as used in English law. The obvious intention of the Act was to make all choses in action transferable as property, that is to say, transferable subject to the conditions and restrictions imposed by Chapter II, and particularly by sections 6, 7, 9 and 10. But, regard being had to recent differences of opinion, it is proposed to make the point clear by the addition of a second sub-section.

Proposed new sections 131 and 132.—Sections 131 and 132 of the existing Act are obviously founded upon section 25, clause (6), of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66) ; but successive amendments of the Bill while under consideration seem to have led to the reversal of each rule of the English law.

In the first place, the Indian section is negative in its terms, while the English section is positive. The result is that the former prescribes a compulsory form of transfer for the specific class of actionable claims to which it relates, whereas the latter merely provides that certain consequences shall follow if this form of transfer be adopted.

In the second place, the English section applies to all debts and other legal choses in action, but the Indian section applies only to debts and beneficial interests in moveable property. It is not clear what rule would apply in India to an actionable claim relating to both moveable and immoveable property ; nor is there any specific provision as to actionable claims in respect of immoveable property. Further, it is not apparent why written notice to the debtor should not be required in the latter case. And, again, it is uncertain, on the construction of the section, whether the term “beneficial interest” is to cover a charge. The English section is confined to absolute assignments.

In the third place, the English enactment requires the transfer itself to be in writing ; but the Indian Act is silent on the point, and therefore, by virtue of section 9, the transfer need not be in writing.

In the fourth place, the English Act requires express notice in writing to be given to the debtor. The Indian Act provides for three alternatives—express notice, the fact that the debtor is aware of the transfer, or the fact that he is a party to the transfer. The Indian Act then curiously goes on to provide that, where express notice is given, it must be given by the transferor ; whereas in practice, of course, notice is given by the transferee in order to complete his title. As to the last point, see *Ragho v. Narayan* (1895), I. L. R., 21 Bom., at p. 62.

It is thought best to legislate on the lines of the English Act so as to restore uniformity in the law of the two countries in so far as the same subject-matter is dealt with, and these new sections have been drafted with that object.

Proposed new section 133.—It is difficult to understand section 133 in its present form. The intention apparently was to adapt the English provision above referred to, which is to the effect that, on notice to the transferee, the transfer is effective “to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.” The reference to international law seems out of place in its present context, as municipal law is always construed subject to the provisions of international law and the latter, if it is to be dealt with at all, should be dealt with separately, as in Chapter XVI of the Negotiable Instruments Act, 1881 (XXVI of 1881). The provision as now drafted will perhaps sufficiently reproduce the English law on the point, while avoiding any reference to the distinction between legal and equitable remedies.

Proposed new section 134.—The provisions of section 137 of the existing Act have been made general so as to apply to all actionable claims. The phrase “subject to all the liabilities” appears to have been adopted as the equivalent of the English phrase “subject to all equities entitled to priority over the right of the assignee,” and, as it may be thought desirable to avoid the technical term “equities,” the words “all the liabilities, defences and priorities” have now been used instead.

Proposed new section 136.—Section 138 of the present Act is here reproduced unaltered. It is of doubtful accuracy, but does not seem to have given rise to any difficulty.

Proposed new section 137.—This reproduces the only unrepealed section of the Policies of Insurance (Marine and Fire) Assignment Act, 1866 (V of 1866). Inasmuch as the provisions of that enactment constitute an exception to the rule laid down in section 131, they ought to find a place in this Chapter. The original section provided for the transfer of marine and fire policies “by endorsement or otherwise,” which probably means “by endorsement or other like means,” i.e., “by endorsement or other writing.”

Proposed new section 138.—The present section 139 simply excepts negotiable instruments from the provisions of the Chapter. If the restrictions on the sale of actionable claims be confined to controverted claims, the only provisions that need be excepted are those of the proposed new sections 130 to 137. But, as regards those new sections, the exceptions contained in the present section 139 require considerable extension. In section 13 of the Negotiable Instruments Act, 1881, the definition of "negotiable instrument" includes only bills, notes and cheques, and does not include the ever-increasing class of negotiable instruments which the usage of the money market recognizes as such—see *Chalmers on Bills of Exchange*, Ed. 5, pp. 312-327. So, again, a saving is required for mercantile documents of title to goods, such as bills of lading, which form a class of quasi-negotiable instruments. The definition embodied in the *Explanation* is taken from the English Factors Act, 1889, and is adopted also in the English Sale of Goods Act, 1893.

Proposed new sections 139 and 140.—These provisions, which correspond with sections 135 and 136 of the present Act and owe their origin to the French and Canadian Codes, have given rise to much difficulty. It is, indeed, almost impossible to give effect to them without construing the expression "actionable claim" in a restricted sense. For example where a business is transferred or converted into a company, the book debts are sold in a lump, and, as these must consist of good, bad and doubtful debts, a lump sum has to be fixed, and it is impossible to say what has been paid in respect of each. It has been suggested that the provision should be confined—

- (1) to actionable claims, where the cause of action has matured (which would cover the case of all book-debts), or
- (2) to disputed actionable claims.

The latter seems to be the right suggestion, and it has been adopted in the Bill. The object is to prevent trafficking in actual or impending litigation, and probably the words "which is in controversy" will meet the object as far as it can be met.

If the restriction be confined to the sale of actionable claims which are in controversy, there appears to be no reason why their transfer to a creditor should be allowed. Possibly the assignee of a bankrupt might be allowed to sell such a claim, but the policy of this is very doubtful. It is for consideration whether clause (b) of the present section 135 should not be omitted. The latter words of clause (d) of that section are not easily understood; for how can it be said that a claim has been made clear by evidence when judgment on it has not been given? This is a question which only the Court about to give judgment could answer, and these words should perhaps also be omitted.

In reproducing the present section 136, the words "legal practitioner" have been substituted for the words "pleader, mukhtar." The provision ought clearly to apply to all legal practitioners alike.

Clause 3 of Bill.

This repealing clause is consequential on the reproduction in the proposed new sec. 137, as explained above, of so much of Act V of 1866 as is extant in the Statute-book.

J. M. MACPHERSON,

Secretary to the Government of India.

REPORT OF THE SELECT COMMITTEE.

Dated 16th January 1900 (Gazette of India, Part V, p. 17, dated 20th January 1900.)

THE following Report of the Select Committee on the Bill to amend the Transfer of Property Act, 1882, was presented to the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 19th January, 1900 :—

“ We, the undersigned, members of the Select Committee to which the Bill to amend the Transfer of Property Act, 1882, was referred, have considered the Bill and the papers noted in the margin,* and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

* Communications from all the Governments and the High Court, Calcutta, omitted here being not important.

2. Chapter VIII of the Transfer of Property Act, 1882, aims among other things at providing for the transfer of that description of property known in England as *choses in action* and described in that Act as actionable claims. Section 130 of the Act defining actionable claims, having, from the generality of its terms, occasioned misconception as to the true nature of the property therein defined and elsewhere in the Act referred to, we are of opinion that the section should be removed from Chapter VIII, and that the term “actionable claim” ought to be more accurately defined in the interpretation clause which governs the construction of the Act as a whole. We, therefore, propose to add to sec. 3 of the Act a definition of “actionable claim,” more precise than the definition contained in the new sec. 130 proposed by the Bill as introduced, and one which may more nearly be taken to be (in the words of the statement of Objects and Reasons) “a fair working definition of the term *chose in action* as used in English law.”

3. Actionable claims, as we propose to define them, are to be distinguished from mere rights of suit. We are of opinion that no more right of suit ought to be transferable, and we propose the omission of certain words in sec. 6 (e) of the Act, in order to make the rule therein laid down a rule of general application. In the same section, cl. (b), we propose an amendment which will bring the language of this Act into harmony with that of the Indian Contract Act, 1872.

4. “Actionable claims” being defined in sec. 3 of the Act, by our proposed addition thereto, we have omitted the definition contained in

the new sec. 130 (1) proposed by the Bill as introduced. Clause 130, sub-section (2), has also been rendered superfluous by the same addition, and we have also omitted it.

5. In sec. 131 (now 130) we have added words to make it clear that a transfer takes effect upon the execution of the instrument of transfer subject to the proviso in sub-section (1). We have also expressly provided that the transferee may sue in his own name, without obtaining the consent of the transferor. The second illustrative case appended to this clause has been restated and somewhat amplified.

6. In sec. 132 (now 131) we propose to enact that a notice of transfer shall be signed by the transferor or his agent, or in case of the transferor's refusal, by the transferee, and shall state the name and address of the transferee. The latter part of this rule goes beyond the requirements of the English law, but we submit that a notice in general terms, not stating the name and address of the transferee, would not be sufficient as a safeguard against fraud. A debtor is, we think, entitled to know the name and address of the person to whom he becomes liable on a transfer of the claim against him.

7. Section 133 has been taken up into new sec. 130.

8. In sec. 134 (now 132) we have substituted the expression "all the liabilities and equities, entitled to priority over the right of the transferor" for the expression "all the liabilities, defences and priorities to which the transferor was subject." The illustrative cases appended to this section, being, we think, open to criticism, we have endeavoured to provide illustrations taken from the English law reports which exhibit more clearly the actual working of the rule laid down.

9. In sec. 136 (now 134) we have substituted the words "received by the transferor or recovered by the transferee" for the words "recovered either by the transferor or transferee." At the end of the section we have added the words "or other person entitled to receive the same."

10. In sec. 138 (now 136) we have included debentures along with stocks and shares, and for the words "and delivery order" we substitute "railway receipt, warrant or order for the delivery of goods."

11. Section 139, as proposed by the Bill as introduced, has been severely criticised by the judicial authorities who were consulted in regard to this Bill. It has been pointed out that the words "which is in controveray" in sub-clause (1) are by no means easy to interpret; and there is a strong body of opinion in favour of omitting cl. (b) and (d) of sub-clause (2). On careful consideration, we think it safer to omit the whole section, and have struck it out accordingly.

12. In sec. 140 (now 137) we think the general word "officer" is sufficient, without specifying clerks and bailiffs. We have altered the language of the section so as to cover the case of a practitioner who stipulates for an interest in the subject-matter of a suit. It seems to

us expedient that the judges, officers and legal practitioners of our Courts should be precluded from dealing in actionable claims generally, and not merely in those claims which fall within the jurisdiction of the Courts to which they respectively belong at the time of such dealing and we have altered the section in accordance with this view.

13. The publication ordered by the Council has been made as follows :—[*Here follow the names of Gazettes.*]

14. We think that the measure has not been so altered as to require re-publication, and we recommend that it be passed as now amended.

F. Raleigh.

P. M. Mehta.

J. K. Spence.

J. T. Woodroffe.

The 16th January, 1900.

[The Hon'ble Rai Bahadur P. Ananda Charlu was unable to attend the meetings of the Committee on the 2nd February, 1900, the Bill was passed into Law.]

GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Indian Councils Acts, 1861 and 1892 (24 and 25 Vict., cap. 67, and 55 and 56 Vict., cap. 14).

The Council met at Government House, Calcutta, on Friday, the 2nd February 1900.

Present :

HIS EXCELLENCY BARON CURZON OF KEDLESTON, P.C., G.M.S.I., G.M.I.E., Viceroy and Governor-General of India, presiding.

The Hon'ble Major-General Sir E. H. COLLEN, K.C.I.E., C.B.

The Hon'ble Sir A. C. TREVOR, K.C.S.I.

The Hon'ble Mr. C. E. DAWKINS.

The Hon'ble Mr. T. RALEIGH.

The Hon'ble Mr. DENZIL IBBETSON, C.S.I.

The Hon'ble Mr. P. M. MEHTA, C.I.E.

The Hon'ble Nawab MUMTAZ-UD-DAULA MUHAMMAD FAITAZ ALI KHAN.

The Hon'ble Mr. J. K. SPENCE, C.S.I.

The Hon'ble Mr. G. TOYNBEE.

The Hon'ble Mr. D. M. SKEATON, C.S.I.

The Hon'ble Mr. J. D. REES, C.I.E.

The Hon'ble Maharaja RAMESHWARA SINGH BAHADUR of Durbhanga.

The Hon'ble M. R. BY. PAYAPPAKAM ABANDA CHARLU, VIDIA
VINODHA AVARGAL RAI BAHADUR, C.I.E.

The Hon'ble KUNWAR SIB HARSAN SINGH AHLUWALIA, K.C.I.E.,
of Kapurthala.

The Hon'ble Mr. J. T. WOODROFFE.

The Hon'ble Mr. J. BUCKINGHAM, C.I.E.

The Hon'ble Mr. H. F. EVANS, C.S.I.

The Hon'ble RAI BAHADUR B. K. BOSH, C.I.E.

The Hon'ble Mr. ALLAN ARTHUR.

TRANSFER OF PROPERTY BILL.

The Hon'ble Mr. RALEIGH moved that the Report of the Select Committee on the Bill to amend the Transfer of Property Act, 1882, be taken into consideration. The motion was put and agreed to.

The Hon'ble Mr. RALEIGH said:—"In introducing this Bill I called attention to the difficulties which the Courts had found in interpreting the provisions of Chapter VIII of the Transfer of Property Act. It was hoped that by a re-drafting of the Chapter as it stood those difficulties might be met, but in consequence of the able note of the Chief Justice of Bombay we found ourselves compelled to go more thoroughly into the question and to re-draft not only the Chapter in the Act, but to consider generally the law relating to actionable claims. The Bill on which the Select Committee reported is explained in the report, and before I move that it be passed, I have to propose only two amendments which, I hope, the Council will take it from the learned Advocate-General and myself, are of a formal character. I beg to move in the first place that, in sec. 132, the latter part of the section be amended, and that the words which now run—"the liabilities and equities entitled to priority over the right of the transferor" should run "the liabilities and equities to which the transferor was subject."

The Hon'ble Mr. WOODROFFE said:—"I beg to second this amendment. The words 'entitled to priority' were doubtless apt and fit in this section as the Bill stood when originally introduced into Council, but by the adoption in Committee of the more general expression 'liabilities and equities,' the words which the Hon'ble Legal Member has moved to omit, have, as I think, been rendered unnecessary, and ought not to be retained. The section will, by their omission, be, in my opinion, freed from some ambiguity."

His Excellency the President said:—"The question is that in sec. 132 of the Transfer of Property Act as amended by the Bill the words 'entitled to priority over the right of the transferor' be omitted, and that for the word 'he' the words 'the transferor' be substituted."

The motion was put and agreed to.

The Hon'ble Mr. RALEIGH said:—"The other amendment I have to propose refers to secs. 136 and 137 of the Transfer of

Property Act. Section 136 runs: 'No Judge, Pleader, Mukhtar, clerk, bailiff or other officer connected with Courts of Justice can bring any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.' And then sec. 137 proceeds to deal with the important subject of the traffic in actionable claims by Judges, legal practitioners and officers of the Court, etc. I propose that these two sections should be transposed, so that the provisions of sec. 136 will apply to sec. 137."

The Hon'ble Mr. WOODROFFE said:—"I beg to second the amendment which has just been moved by the Hon'ble Legal Member. The question has arisen in this way: it has been suggested that regard being had to the language of the present sec. 137, no legal practitioner could take a cheque in payment of his fees, a result which would, of course, be a serious matter for any member of the profession to which I have the honour to belong, and that by placing sec. 136 after 137 which exempts from the application of this Act negotiable instruments, such as a cheque, the difficulty would be overcome."

His Excellency the President said:—"The question is that secs. 136 and 137 of the Transfer of Property Act as amended by the Bill be transferred and be renumbered accordingly."

The motion was put and agreed to.

The Hon'ble Mr. RALPHIGH moved that the Bill as amended be passed.

The Hon'ble Mr. WOODROFFE said:—"As one of the members of the Select Committee to which the Bill was referred, it may, perhaps, not be out of place were I to offer a few observations to the 'Council upon the principles which guided our considerations in Committee and the more salient amendments which were there introduced.

"The Transfer of Property Act is divided into chapters, each purporting to deal exhaustively with its own subject-matter, and having thus dealt with transfers of property by act of parties in one chapter, sales of immoveable property in another, mortgages and charges of such property in a third, and leases of immoveable property, as also exchanges and gifts of property generally in subsequent chapters, Chapter VIII deals with the transfer of actionable claims. So in considering the Act it appeared to us unreasonable to suppose that the Legislature intended to deal in Chapter VIII with any of the matters for which that Act had already made specific provision, or to suppose that actionable claims were intended to cover every claim for which an action would lie in our Courts so as to include claims arising out of sales, gifts, mortgages or leases of immoveable property or exchanges or gifts of moveable property within its provisions. Unhappily the term 'actionable claim,' which found no place in the original Bill as laid before the Law Commissioners in 1879, had not been defined, and sec. 130 having from the generality of its terms occasioned considerable difficulty in determining what was the true nature of the property dealt with in that

Chapter, we thought that the term should be so defined as to make it clear that actionable claims were property of the description known to English lawyers as *choses in action*, and as such dealt with in England by the Supreme Court of Judicature Act of 1873. The definition arrived at by the Committee may, I venture to think, be taken to be a fairly correct description of that kind of property, and seeing that the term 'actionable claim' occurred elsewhere in that Act, the Committee placed the definition in the interpretation clause.

"One other and more salient matter has been the removal from the Transfer of Property Act of sec. 135. The origin of that section will be found in the Roman law, and was there known as *lex Anastasiana*. It was intended to provide for cases of unfair sale. In an appeal from British Guiana, the only other part of Her Majesty's dominions in which that law found a place, the Privy Council declared that it could not, consistently with the ordinary principles which regulate the administration of Justice in England, apply that law to cases where there was no taint of unfairness. The clause, moreover, was of this character, that while it pressed, or might press, harshly against the honest transferee of a book-debt for which he had paid less than the amount of that debt, regard being had either to the risk or delay of recovery, he might find himself, when he sued to recover it, obliged to take such debt less the cost which he had really paid for that risk. On the other hand, it afforded no protection against dishonest dealing and did not apply to cases of gift at all. It was, therefore open to any person who desired to deal dishonestly either to put forward the case of a transfer of an actionable claim as a gift or as a sale for a sum of money which he had not really paid. Moreover, the Courts of this country were at hopeless variance with one another upon this matter. The Courts of Allahabad and Madras took one view: Bombay agreed in part with Madras and in part with Calcutta. For these reasons it appeared desirable to omit this section altogether.

"The only other remaining section on which any observation appears to me needful is that which is now numbered 136, and to which there has been a considerable extension by the amendments introduced. As the section stood before such amendment it was limited to such persons as were therein mentioned buying or trafficking in such claims in the Courts in which they were for the time being employed, but having regard to the fact that there are constant changes of Judges as well as officers, and that legal practitioners from all parts of the country may from time to time plead and appear in any Court, it seemed to be desirable to make the prohibition absolute as regards them all."

The motion was put and agreed to.

CALCUTTA,
The 7th February 1900.

(Sd.) J. M. MACPHERSON,
SECRETARY TO THE GOVERNMENT OF INDIA,
Legislative Department.

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ADDENDA ET CORRIGENDA.

I. ADDENDA.

Note.—The cases in the work including those in the following *addenda* have been brought down to the end of December 1900.

S. 1, *add* :—

The preamble to an Act should be read with its sections. *Fulchand v. Mt. Kamesh Koer*, 4 C. W. N., cxxvi.

Unless from the language a contrary effect is clearly intended every statute which takes away or impairs vested rights must be presumed not to have a retrospective operation. *Kala Tihari v. Narayan*, 13 C. P. L. R., 143.

Though the Act is not in force in the Punjab, it has been held that the principles it embodies being founded on equity, and justice are of universal application throughout India—*Lakshmi Narayan v. Tara Singh*, 1 P. L. R., 513.

To S. 3, *after* the definition of “attached to the earth” *add* :—

“Actionable claim” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. (Added by the Transfer of Property Amendment Act, 1900 (Act II of 1900), s. 2.)

For Commentary, see §§ 931—933.

The definition of notice given in s. 3 is a comprehensive one. *Preonath v. Ashutosh*, 4 C. W. N., 490. Mere registration of a document does not amount to notice. *Preonath v. Ashutosh*, 1. L. R., 27 Cal., 358.

A transferee is guilty of gross negligence if he fails to call for the title-deeds of the transferor. Hence if the latter has assigned his interest or created an incumbrance by depositing the deeds with a third person, he cannot get rid of his liability by pleading that he had had no notice.—*Dixon v. Winch*, L. R. [1900], 1 Ch., 736.

S. 3, *add* :—

From (b), (c) *omit* the words “for compensation for a fraud or for harm illegally caused.”

And *add* to the Commentary :—

The effect of the omission of the words “for compensation for a fraud or for harm illegally caused” from the clause has made the rule one of general

application. (S. 3 (i) Transfer of Property Amendment Act, 1900 (Act II of 1900). (A right to sue for compensation in any case is now untransferable. It is a personal right and can only be enforced by the party aggrieved 6 (A).

For (6) h (2) omit "for an illegal purpose" and read "for an unlawful object or consideration within the meaning of the Indian Contract Act, 1872."

And add to the Commentary :—

No change in the meaning appears to have been intended by the amendment, the avowed object of which is to bring the language of the Act into harmony with that of the Indian Contract, 1872. Report of the Select Committee, § 3.

A right of residence and maintenance is a personal right and not capable of attachment and sale. *Nanak Chand v. Kishan Chand*, 1 P. L. R., 209.

An assignee of a decree stipulated that he would pay the money if he could recover the amount from the judgment-debtor. It was held not to be trafficking in litigation, and was consequently a valid assignment. *Vythilingam v. Seetaramaiyar*, 10 M. L. J. R., 77 (80).

The right of management of a temple cannot be assigned unless a custom to do so is established. *Guanasambanda v. Velu Pandaram*, 4 C. W. N., 329, P. C.; *Rajah Vurmah v. Raci Vurmah*, I. L. R., 12 Mad., 483. A contract based on personal considerations is not assignable without the consent of the debtor or the other party to the contract. *Namasiraya v. Kadir Ammal*, I. L. R., 17 Mad., 168; *Furrow v. Wilson*, L. R., 4 C. P., 744; *Humble v. Hunter*, 12 Q. B., 810; *Arkansas Valley, ... Co. v. Belden Mining Co.*, 127 U. S. R., 379, followed. On this principle it has been held that a legal practitioner cannot transfer his briefs. *Birju Rai v. Muhammad Zahir Alam*, A. W. N. [1899], 18.

The hereditary right to manage an endowment is inalienable, unless it is sanctioned by custom. *Ganasambanda v. Velu*, 10 M. L. J. R., 29 P. C.

An agreement is not illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty, the penal consequences of which would be limited to the imposition of the specific penalty, but it would not make the contract void. Thus where under the Bombay Tolls Act Government leased to the plaintiff the levy of tolls on certain conditions, one of them being that the plaintiff should not sub-let the tolls without the permission of the Collector previously obtained, and providing that in case of a breach of the condition the Collector might impose a fine of Rs. 200, the plaintiff having sub-let the tolls in contravention of the terms of his lease, sued the defendant to recover the premium due for the sub-lease, it was contended for the latter that the lease was illegal and as such void, having been made in violation of the terms of the Tolls Act, but the contention was overruled.—*Bhikandhai v. Hiralal*, I. L. R., 24 Bom., 622; distinguishing *Raghunath v. Nathu*, I. L. R., 19 Bom., 626; and see *Gangadhar v. Damodar*, I. L. R., 21 Bom., 522; *Judonath v. Nobin Chunder*, 21 W. R., 289; *Gauri Shankar v. Mumtaz Ali*, I. L. R., 2 All., 411.

S. 7, add :—

A mortgage by a female is valid if the next heir assents to it at the time when the mortgage is made or afterwards. The validity of such an alienation can be contested only by the next heir and not by his alienee even though

such alienation is prior to the next heir's assent. *Manladad v. Ram Gopal*, 1 P. L. R., 186.

Where a person acting upon the advice of his solicitor signs a document the nature and contents of which he does not understand, and upon such a document the mortgagee acts and makes advances to the solicitor in his capacity as agent for the mortgagor, the latter cannot afterwards be allowed to plead that being a man of not much education he had been over-reached by his solicitor, but is, on the other hand, estopped by his conduct from denying the deed and is therefore liable thereunder. *King v. Smith*, L. B. [1900], 2 Ch., 125.

An alienation by way of mortgage of vatan property, or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the vatandār, who mortgaged. The mortgage was in its inception void against the heir of the vatandār and had not become validated against the heir by reason of the repeal of the sections in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874. The childless widow of a vatandār, deceased in 1847, was the recognised vatandār in possession in 1865. She mortgaged two villages of the vatan to the father of the respondents. The latter two, after litigation, retained possession in 1886, by order of the Commissioner in the Revenue Department, until there should be a decree of Court to the contrary. The widow, according to the judgment below, had held the vatan adversely to her late husband's son, the plaintiff, who was born in 1848 of her co-widow, and he was the true heir, entitled from his birth. But the High Court gave effect to the adverse possession of the widow for the period of limitation supporting the mortgage. The plaintiff was the sole heir of the widow, his step-mother, who died in 1877. The appellant contended that the vatan as inherited by him was free from the mortgage encumbrance, and that he was entitled to possession. Reversing the decree of the High Court, the Privy Council ruled that the mortgage was void against the heir, and had no force beyond the life of the vatandār who had executed it. The decree of the Subordinate Judge to that effect, and for possession, was maintained. *Padaya v. Swamirao*, 1. L. R., 24 Bom., 556 P. C.; approving *Kalu Narayan v. Hanmappa*, 1. L. R., 5 Bom., 435.

S. 8, add :—

The devise of specific property by a mortgagee in possession is sufficient to pass the beneficial interest in the mortgage-debt. *In re Carter-Dodds v. Pearson*, L. R. [1900], 1 Ch., 801.

S. 14, add :—

If a testator direct accumulation of his estate for two separate periods, one of which is good, and he offends against the rule of perpetuities, the direction is good so far as the first period is concerned. Specific trusts or estates good in themselves are not invalidated by a subsequent disposal of the residue. *Akhter Mohan v. Gunga Narain*, 4 C. W. N., 671, note.

S. 35, add :—

Where each member of a class has a distinct right of election, no one is bound by the decision of the majority. *Fytch v. Fytch*, L. R., 7 Eq., 494.

S. 39, add :—

Section 39 does not protect a transferee for consideration, when the immoveable property transferred has already been declared by a decree of

Court subject to a charge in favour of a Hindu widow for her maintenance. The fact that the maintenance claimed accrued due subsequent to the transfer does not affect the liability of the property to be sold in execution of a decree for the maintenance so claimed. *Kuloda Prosad v. Jageshar Kver*, 1. L. R., 27 Cal., 194.

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. The words "*with the intention of defeating such right*" in the section naturally govern all that follows those words. Given a right to receive maintenance from the profits of immoveable property and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value and without notice of the right. But where the transfer has not been made with such object, the right cannot be enforced against the transferee, although he had notice of the right. The reason for such a rule is not far to seek. A Hindu widow's right to receive maintenance has been held to be a right of an indefinite character, which, unless made a charge upon property by agreement or by a decree of Court, is only enforceable like any other liability in respect of which no charge exists. *Ram Kunwar v. Ram Dai*, 1. L. R., 22 All., 326; following *Lakshman v. Satyabhamabai*, 1. L. R., 2 Bom., 494; *Shamlal v. Banna*, 1. L. R., 4 All., 296 (299) F. B.; cf. Mayne's Hindu Law (5th Ed.), § 518.

Where there is a widow having a right to be maintained out of ancestral property, a holder of such property cannot alienate it, so as to defeat her right, *Mt. Lalli Kuar v. Ganga Bishan*, N.-W. P., H. C. B. (1875), 261; *Janna v. Macbul*, 1. L. R., 2 All., 315; *Devi Pershad v. Gunwatti*, 1. L. R., 22 Cal., 410; *Becha v. Mothina*, A. W. N. (1900), 210.

S. 40, add:—

In England it has been held that when the benefit of a restrictive covenant has been once clearly annexed to one piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation of the assignment of the land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in or was annexed to the land which he bought. The purchaser's ignorance of the existence of the covenant does not defeat the presumption, though it may be rebutted by proof of facts inconsistent with it. *Rogers v. Hosegood*, L. R. [1900], 2 Ch., 388.

S. 45, add:—

"The principle of joint tenancy appears to be unknown to Hindu law except in the case of co-parcenary between the members of an undivided family." *Jogenwar v. Ram Chund*, L. R., 23 I. A., 44.

Where property is sold subject to restrictive covenants which are not disclosed to the purchaser, the Court cannot decree specific performance with compensation, the reason being that such covenants are incapable of valuation. *Rudd v. Lanchettes*, L. R. [1900] 1 Ch., 815.

S. 52, add:—

A party will be affected by *lis pendens* if he has notice of a partition suit in respect of the property. Hence if after the institution of a partition suit but before the service of the summonses, one of the defendants transferred his share of the property alleging it to be one-sixth, it was held that the transferee having had notice of the suit was affected by *lis pendens*, and that he could not get more than what is adjudged to be the share of the transferor. *Jogendra Chunder v. Fulkumari*, I. L. R., 27 Cal., 77.

The doctrine is applicable equally to property *bonâ fide* acquired at a Court sale. Thus where a person purchased at an auction held under secs. 13 and 54 of the Revenue Sale Law, the share of an estate sold for its arrears, and at the time of such purchase a suit to enforce an existing mortgage on the property was pending, it was held that the auction-purchaser took the property subject to the decree subsequently passed, and in execution of which the mortgagee was competent to bring the property to sale, but that the sale made to the auction-purchaser was so far valid as it was not inconsistent with the rights of the mortgagee in that suit, and that therefore he was competent to redeem the mortgage, but only of course before the confirmation of the sale held in execution of the mortgage-decree. In other words, in such a case the purchaser acquires no more than the equity of redemption of the mortgagor and no right inconsistent with those of the litigating parties during the pendency of whose suit the transfer was effected. *Hur Sankar v. Sheo Gobind*, I. L. R., 26 Cal., 966.

Where the plaintiffs purchased a certain property after the decision but before the drawing up of the decree of the Lower Court which declared the seller's title to the property, and the decree was subsequently appealed against and reversed by the Appellate Court, it was held that the doctrine of *lis pendens* applied, as the plaintiffs purchased during the active prosecution of a suit within the meaning of the section, although no appeal was actually pending at the time when the purchase was made. *Deno Nath v. Shama Bibee*, 4 C. W. N., 740; *Gobind Chandra v. Gurn Churn*, I. L. R., 15 Cal., 94 (99). In this case the case turned upon the point that the "inevitable appeal" was delayed only because the decree had not been drawn up, and that therefore the purchase must be regarded as having been made during the "active prosecution" of the suit. Cf. *Kaesmunissa Bibee v. Nilratna Bose*, I. L. R., 8 Cal., 79 (85).

A obtained a decree against B, and in execution thereof attached certain property; C objected under sec. 278 of the Code of Civil Procedure, but his objection was disallowed. He brought a regular suit, but it was dismissed. He then appealed against the decree, and during the pendency of the appeal the property was put to auction and purchased by D, who subsequently sold it to E. The appeal was decreed in favour of C, who thereupon sued both D and E for the recovery of the property on the ground that the purchase by D being *pendente lite* did not affect his right, and it was so held by the Allahabad High Court. *Sukhdeo Prasad v. Jumna*, A. W. N. (1900), 199.

S. 58, add:—

A mere preference by a debtor of one creditor to another, and *à fortiori* a mere *bonâ fide* security given to a creditor to the extent of his debt, is not within the scope of the section, as it is not within the English Statute of 13

Eliz., Cap. V. But where a document given by way of security goes further and secures debts that are not due, the effect is, *quod* such fictitious debts, to defeat or delay the creditors. Where a party intends to rely upon a document as not within the meaning of the section, because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more. *Narayana v. Viraraghavan*, 1. L. R., 23 Mad., 184. A party to fraud cannot be relieved against the consequences of his own acts where the fraud has been consummated. *Honapa v. Narsapa*, 1. L. R., 23 Bom., 406. In rebutting the presumption of fraud, it is not enough that the person had independent advice, unless he acted upon it. *Powell v. Powell* [1900], 1 Ch., 243. In the case of persons standing to each other in fiduciary relationship, *e.g.*, solicitor and client, the party benefited must show that the transfer was just and proper under the circumstances of the case (*ib.*). Mere inadequacy of consideration in respect of a purchase, without more, is no ground for holding it champertous. But it may be sufficient to make it voidable as against transferees for value under sec. 53. *Sira Ramayya v. Ellamma*, 9 M. L. J. R., 17; *Gopal Ram v. Gangaram*, 1. L. R., 14 Bom., 72.

This section does not alter in any respect the law, such as it existed in this country at the time the Act was passed *Bhagwant v. Kedari*, 2 Bom. L. R., 986.

An alienation with the express object of defeating an impending execution is not *per se* fraudulent. The circumstance is only indicative of a race between two competing creditors for obtaining prior satisfaction, and the winner, provided he is not guilty of foul play, is not to be disqualified merely because he runs to win. *Bhagwant v. Kedari*, 2 Bom. L. R., 986.

Scope of the section will be found generally discussed in *Bhagwant v. Kedari*, 2 Bom. L. R., 986; *Mardan Singh v. Karanju*, 13 C. P. L. R., 180.

S. 54, add:—

Although a registered document is in cases of sales of the value of Rs. 100 and above absolutely necessary, it does not thence follow that a vendee can under no circumstance acquire an indefeasible title in the property sold to him under a defective conveyance. The possession of a vendee under these circumstances must be regarded as adverse, and hence after the expiration of twelve years his title necessarily becomes perfect. *Nallamuthu v. Bettha Naicken*, 9 M. L. J. R., 258.

The existence of a nuisance in the house unknown to the parties is no ground for refusing the specific performance of the contract of sale, especially where the purchaser could, under the terms of the tenancy, expel the tenant without notice, in case of disorderly user. *Hope v. Walter* [1899], 1 Ch., 879. But the case is quite different where the purchaser would be exposed to criminal proceedings by reason of the state of the property at the time of the sale. No Court will compel a man who has innocently entered into a contract for the purchase of such property to buy it. But at the same time this will not entitle the vendor to a rescission of the contract, and he will be liable in damages. *Hope v. Walter* [1900], 1 Ch., 257; *Lucas v. James*, 7 Hare, 410, distinguished.

The mere registration of a conveyance is not by itself sufficient to pass the property or to make the sale a completed one. In order to complete the transaction, there must be besides either delivery of the sale deed to the

vendee, or payment of consideration or some other overt act such as effectuation of the mutation of names evidencing the completion of transfer, to justify the Court to hold that the vendor had finally divested himself of his rights in the property in favour of the purchaser. *Shoo Narain v. Darbari*, 2 C. W. N., 207; approved in *Mauladan v. Rughunandan*, 1 L. R., 27 Cal., 7; *Tindanmal v. Muhammad*, 5 Sindh, 83. This being premised, a transfer of immoveable property passes to the transferee all the rights of the transferor unless there appear in the deed of sale a different intention, either express or necessarily implied. *Ram Gopal v. Chandra Bhusan*, 4 C. W. N., 63.

If a vendor agree to give a commission to the agent of the vendee even not knowing that he is such an agent, the vendee is entitled to the whole of the commission agreed by the vendor to be paid to the agent, even if the agent reduce the amount of the commission after the date of the sale. *Grant v. The Gold Exploration.....Syndicate* [1900], 1 Q. B., 233.

A vendor is not debarred from anything in the Evidence Act, sec. 92, from showing that notwithstanding the recitals in the deed, he had not received the consideration as therein stated. *Sablal v. Indrajit*, 4 C. W. N., 485 P. C.

While the proviso no doubt provides that a contract of sale does not of itself create any interest in or charge on the property sold, but where the contract is followed up by something more, as for example, transfer of possession and payment of the whole of the purchase-money, then the mere fact that the transfer-deed has not been executed and registered would not prevent the property from passing to the transferee. Thus in a case where under a contract of sale with respect to certain fields, possession was delivered to the vendee, and the whole of the purchase-money was paid to the vendor but the transfer was not effected, as the necessary conveyance had not been executed. Subsequently a judgment-creditor of the vendor sought for a declaration that the fields were liable to be attached and sold as the property of the judgment-debtor, it was held that the judgment-debtor was nothing more than a bare trustee and had no attachable interest in the property. *Karalia v. Mansukhran*, 1 L. R., 24 Bom., 400; distinguishing *Hormaji v. Keshar*, 1 L. R., 18 Bom., 13; cf. sec. 55 (6) (b), *post*, and sec. 91, Indian Trusts Act X. Similarly in another case it was laid down that an unregistered agreement of sale accompanied with possession is entitled to priority over a registered deed of sale subsequently executed. *Hari Keshav v. Hiru Chima*, 2 Bom. L. R., 110. See also *Karbasappa v. Dharmappa*, *ib.*, 223. Where the same property was mortgaged to two creditors, and one of them instituted a suit and put the property to sale, and thereafter the second purchaser also had the same property sold, it was held that nothing passed by the second sale. "It is clear," said Parsons and Banale, JJ., "that the properties were only charged once under the deed, and therefore they could only be sold once, so that the person who first bought any of them must be held to be entitled to it. Had the provisions of the Transfer of Property Act, sec. 85, been observed, there could have been no such thing as a second suit or a second sale. As it is, Sorabji having been allowed to sue alone and the portion of the property now in suit having been sold by him alone, we must hold that the other creditors acquiesced in his conduct, and their remedy will be against him, if he has obtained more money than he was proportionately entitled to out of the charge. The charge, however, to which the property was made liable by

the deed, must be held to have been liquidated by its sale, and there was no second charge upon it that could be recovered from it by any other of the creditors." *Pranirandas v. Ishwardas*, 2 Bom., L. R., 30.

A contract of sale cannot be rescinded by any one of the parties thereto on the ground of unilateral mistake. Nothing short of fraud is sufficient to set aside a contract once so made. *May v. Platt*, L. R. [1900], 1 Ch., 616; observing on *Harris v. Pepperell*, L. R., 5 Eq., 1; *Garrard v. Frankel*, 30 Beav., 445; *Paget v. Marshall*, 28 Ch. D., 255.

On the 27th December 1895, *S* executed an unregistered document bearing a one-anna receipt stamp, in favour of *J*, agreeing to execute a deed of conveyance of certain immoveable property in favour of *J* within a certain time, and acknowledging receipt of earnest money. Subsequently, on the 3rd January 1896, *S* executed a registered *bainanamah* in respect of the same property in favour of *R* and *H*, which was followed by a registered deed of conveyance in their favour, dated the 9th January 1896, and delivery of possession, although *R* and *H* had notice of the previous contract with *J* before the registration of the *bainanamah* and execution of the deed of conveyance in their favour. *Held*, that, having regard to sec. 54 of the Transfer of Property Act and sec. 27 (b) of the Specific Relief Act. in a suit for the specific performance of contract brought by *J*, neither the *bainanamah* nor the deed of conveyance in favour of *R* and *H* could prevail against the prior unregistered contract of *J*. *Held*, further, that the unregistered document of the 27th December 1895 came under sec. 17, cl. (h) of Act III of 1877, and was not inadmissible in evidence for want of registration: and that the registered *bainanamah* of the 3rd January 1896 did not take effect against it, under sec. 50 of that Act. *Hurnandun Singh v. Jawad Ali*, I. L. R., 27 Cal., 468.

The sale of immoveable property defined in the section is not necessarily exhaustive for all purposes. Thus under the Mohammedan Law of Shaffa or Pre-emption, sale of a thing at a price to be fixed by another person is invalid, and hence such a sale would not give rise to a right for pre-emption unless the purchaser have possession of the thing sold in which case the sale is deemed to be complete. *Najm-un-Nisou v. Ajaib Ali*, I. L. R., 22 All., 343. In considering the question of pre-emption the Mohammedan law alone is to be applied, and hence it may happen that a sale may be complete under the section and yet incomplete under the Mohammedan law, and *vice versa*. (*Begam v. Muhammad Yakub*, I. L. R., 16 All., 344 F. B.) The necessary ingredients of a perfect sale under the Mohammedan law will be found fully discussed in Baillie's Mohammedan Law of Sale (p. 4), and in the *Fatwas Alamgiri*, Vol. III (p. 3). The law of pre-emption will be found dealt with in Baillie's Digest of Mohammedan Law (p. 477), and in Ameer Ali's Mohammedan Law, Vol. I, Chap XXV (pp. 589, 611).

A contracted with *B* for the purchase of some property paying the price in instalments. Having paid all but the last instalment *A* disappeared, and *B* could not trace his whereabouts. *B* thereupon entered upon the property. Sometime after *A* re-appeared and claimed specific performance of his contract and damages. The first Court held that *A*'s conduct amounted to repudiation of his contract. But reverting this decision it was held by the Court of Appeal that the conduct of *A* did not amount to repudiation and that therefore he was entitled to damages but could not claim specific performance. *Cornwall*

v. Henson, L. R. [1900], 2 Ch., 298 ; overruling *Cornwall v. Henson*, L. R. [1899], 2 Ch., 710.

S. 55, add:—

In a case the plaintiff negotiated with the defendant's agent for the purchase of a house to carry on his preparatory school for boys. The defendant's agent was aware of the purpose for which the house was required and informed the plaintiff, in answer to an inquiry on this point, that there were no restrictions preventing the house from being used for that purpose. The plaintiff asking to see a deed of covenant of 1851, subject to the provisions of which the house was to be sold, he was told that it contained nothing that would interfere with the carrying on of a school. The plaintiff thereupon entered into a contract for the purchase of the house. The deed of conveyance of 1851 after prohibiting certain offensive and noisy trades and businesses, provided that there should not be carried on "any trades and business or occupation whatsoever whereby any unwholesome or offensive or disagreeable smell or gas or unwholesome or offensive or disagreeable matter deposit or fluid or any injurious or offensive or disagreeable noise or nuisance shall or may be collected, occasioned, caused or made." The plaintiff on coming to know of this declined to complete his purchase and demanded the return of his deposit. This being refused he brought this action for rescission of the contract and for recovery of his deposit with interest. It was held that the covenants could not be limited to trades or businesses *ejusdem generis* as those previously specially mentioned, and that although the agent's representation may not have been fraudulent and might have been caused by the agent wrongly construing the deed or making a legal mistake, the contract was liable to be rescinded. *Wanton v. Coppard* [1899], 1 Ch., 92 ; following *Tud Heatly v. Benham*, 40 Ch. D., 80.

Under sec. 55 (2), there is not only the covenant that the interest which the seller professes to transfer to the buyer subsists *and that he has power to transfer the same*. *Vishwanath v. Vithoba*, 13 C. P. L. R., 97 ; following *Basaraddi v. Enajaddi*, I. L. R., 25 Cal., 298.

It has been observed by a full Bench of the Allahabad High Court, *Hari Tiwari v. Raghunath*, I. L. R., 11 All., 27 (30), that the period of limitation in the case of a breach of a covenant for title begins to run from the time when the deed was executed. A similar view has also been taken in a case decided in Bombay. *Raja Babu v. Krishnarar*, I. L. R., 2 Bom., 273 (293). But the observation in the Allahabad case is a pure *obiter dictum*, and gives no reason why time should invariably begin to run from the date of the execution of the deed, rather than from the date of the discovery of the defect. The Bombay case is no doubt an authority in support of the same view.

But in an English case, *Spoor v. Green*, L. R., 9 Ex., 99 (116), it has been laid down that the time of limitation does not necessarily begin to run from the making of the covenant, but may commence from the breach upon which alone the covenantee's right of action would begin. In this connection it is well to observe the distinction that there is between the covenant for title and the covenant for quiet enjoyment. The former is broken by reason of the existence of an adverse title in another, but the latter is broken only when the covenantee's possession is disturbed by entry of another. *Kingdon v. Nuttle*, 1 M. & S., 355 ; 4 M. & S., 583 ; *King v. Jones*, 4 M. & S., 188 ; *Spoor v.*

Green, L. R., 9 Ex., 99 (116, 117). So in another case Lord Ellenborough observed:—"The covenant passes with the land to the devisee, and has been broken in the lifetime of the devisee; for so long as the defendant has not a good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which not being done the covenant is broken once for all, but it is the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require." *Kingdon v. Nottle*, 4 M. & S., 53 (57). It would thus appear that it is the resulting damage, and not even the mere breach of covenant, which gives the right of action. Thus suppose *A* sells to *B* an estate. And it turns out that he had one or two years previously already transferred half of it on his death to *C*, should the latter be then living. *A* lives for twenty years and then dies, and *C* survives him and enters. Now in such a case there can be no doubt but that the covenant was broken as soon as it was made. But should *B* be ignorant of the conveyance until *A*'s death, he loses half his land and has no remedy for limitation as long since extinguished his right. And if he hears of it and sues within the twenty years, but in *A*'s lifetime, how can the damages be assessed, in the uncertainty whether *A* may not survive *C*, and so that the covenantee will never be disturbed in possession.

An express covenant excluding the operation of the section could not be made so as to exclude the equitable rights of the vendor. Such covenant even if made would be relieved against. Thus in a recent English case certain property, of which measurements and boundaries were described, belonging to the defendant was put up to sale. The particulars of sale contained a condition that "the property is believed and shall be taken to be correctly described in the particulars as to quantity or otherwise, and if any error, mistake, misstatement or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof. The plaintiff purchased it at the auction, signed the particulars and paid a deposit. It was subsequently found out that there was defective title to nearly one-fourth of the land sold, and the plaintiff asked for a return of the deposit and rescission of the contract. The defendant contended that that by virtue of the terms of the particulars, the plaintiff was not entitled to either relief, and that he was entitled to claim specific performance. It was held that specific performance could not be ordered, and that the plaintiff was entitled to rescind the contract and to have the deposit returned.—*Jacobs v. Revell*, L. R. [1900], 2 Ch., 858.

The vendor's lien for unpaid purchase-money on land sold is governed by Act 111 and not by Act 132 of the Limitation Act—*Uthanganakath v. Dayamma*, 10 M. L. J. R., 349; *Natesan v. Soundarraja*, I. L. R., 21 Mad., 141; followed *Harlal v. Muhammadi*, I. L. R., 21 All., 454; *Virchand v. Kumaji*, I. L. R., 18 Bom., 48; *Chunnilal v. Bai Jethi*, I. L. R., 22 Bom., 846, dissented from.

A suit to recover unpaid purchase money on the security of the property sold is governed by Art 111 and not Art. 132 of the Limitation Act. *Uthanganakath v. Dayamma*, 10 M. L. J. R., 349; *Natesan v. Soundarraja*, I. L. R., 21 Mad., 141, followed; *Harlal v. Muhammadi*, I. L. R., 21 All., 454, dissented from. It may be noted that the Allahabad case follows the view taken in Bombay in *Virchand v. Kumaji*, I. L. R., 18 Bom., 48; *Chunnilal v. Bai Jethi*, I. L. R., 22 Bom., 846. It would appear that the view taken by Strachey, C. J., in the Allahabad case is more dictated by the anomalies which are involved in the

Madras view than by the plain interpretation of the two Articles. The Limitation Act enacted in 1877 could not, as has been pointed out by Shephard, J., in the Madras case above cited, be interpreted with reference to an enactment on a totally different subject passed some five years later.

The limitation for recovery of purchase-money by the vendor is not six years as provided in Art. 116 of the Limitation Act, which presupposes a *Contract* in writing registered, which cannot be supposed to include a sale-deed. "The obligation on the part of the buyer to pay the purchase-money is different from the obligation arising under a covenant for title. The obligation to pay arises from the contract between vendor and purchaser, whereas the covenant for title is implied or expressed in the conveyance." (*Per* Shephard, J., in *Uththangandkath v. Dayamma*, 10 M. L. J. R., 349 at p. 352, distinguishing *Krishnum v. Kunnan*, 1 L. R., 21 Mad., 8; which was a suit for damages for breach of the covenant for title. Cf. *Ohinna v. Peda Rama*, 1 M. L. J. R., 479.)

Where in a suit for specific performance of a contract of sale, brought against a mortgagor and mortgagee of certain properties, a person obtained a decree and in pursuance of the order of the Court paid the whole purchase-money into Court to the credit of the mortgagor, who failed to satisfy the mortgage, it was held that it was the duty of the purchaser and not that of the mortgagee to see that the money deposited in Court was first applied in discharge of the mortgage, and that the mortgagee was, therefore, entitled to the benefit of the security. *Kandasami v. Jagathamba*, 10 M. L. J. R., 353. As between the purchaser and mortgagee it was no doubt the former's duty to satisfy the debt. No doubt the mortgagee might have applied to the Court to alter its decree, but he was under no obligation to do it. And no more was the purchaser, but if he parted with his money irrecoverably, without first seeing that the property was freed from the incumbrance, he did so at his own peril, and must take the consequences.

Where the language of an instrument is clear the Court could not allow parties to rectify it by adding some words, which would qualify its meaning. Thus where the vendor conveyed "all estate, term and interest" in a certain land, shown red in the conveyance, and the purchaser afterwards found that the vendor had no interest in that portion of the land, and claimed damages for breach of covenant for title, the vendor's contention that he had conveyed what interest *if any* he had in the lands, and that he was not liable in damages if he happened to have no right was negatived, nor was his prayer for the rectification of the instrument by the insertion of these words conceded. It was further laid down that so long as the conveyance was clear and definite as to the lands conveyed, it was not open to the vendor to prove that the purchaser had notice of the diminution in their quantity. *May v. Platt*, L. R. [1900], 1 Ch., 616; following on the question of notice—*Cato v. Thompson*, 9 Q. B. D., 616; *Page v. Midland Ry. Co.*, L. R. [1894], 1 Ch., 11. As to parol variation, *Woolam v. Hearn*, 7 Ves., 211; *Daries v. Fitton*, 2 D. & War., 225, cited.

Thus in a case the transferee of a mortgage having failed to give notice of the transfer to the mortgagor, the latter and the original mortgagee jointly conveyed the property to a third person as unencumbered. The mortgagee being a solicitor, the preparation of the conveyance was left entirely in his hands, and it contained false recitals, but no reference was made to the mortgage. From the amount of the purchase-money the original mortgagee,

retained moneys due on the mortgagee, but the mortgagor did not ask for or obtain the mortgage-deed or other documents of title, which had passed into the hands of the transferee. The purchaser had no notice of the transfer. The question being who was to suffer for the fraud of the mortgagee, it was held that the mortgagor was not entitled as against the transferee to set up the payment to the original mortgagee, as he was guilty of gross negligence in having been a party to the false recitals in the conveyance and in not having called for the documents of title at the time of discharging the mortgage, and that the transferee who took, subject to the mortgage, could not get rid of the incumbrance by the subsequent constructive payment of the mortgage-money. It was observed that the negligence of the transferee in omitting to give notice was far less grave than the negligence of the mortgagor in not calling for the title-deeds at the time of discharging the mortgage.—*Dixon v. Winch*, L. R. [1900], 1 Ch., 736.

It is the duty of the vendor to inform the purchaser if the property is incumbered or is held on a lease by another person, which may postpone his immediate enjoyment. Any fact calculated to keep the purchaser in ignorance of the real state of the property is a defect for which the vendor is liable.

S. 58, add:—

An instrument of mortgage executed on the 26th June 1882, that is, before the Transfer of Property Act came into force, was to be construed with reference to the law as propounded in the course of Madras decisions commencing in 1858 as indicated by the Privy Council in *Thambusami v. Hussain Raruthan*, I. L. R., 1 Mad., 1 P. C. "Though the documents now under consideration," observed Boddam, J., "were executed in 1882, that is about seven years after the decision of the Privy Council in *Thambusami Mudali v. Hussain Raruthan*, which was passed in 1875, they must, I think, be construed similarly as documents executed before 1875, but not before 1858, because the supposed effect of the current Madras decisions between 1858 and 1875 cannot, I think, be considered to have been removed by the Privy Council judgment in *Thambusami Mudali v. Hussain Raruthan*, so as that document executed subsequently to the judgment and before the Transfer of Property Act came into force should be construable as having been made with reference to the law as it existed before 1858 and as approved by the Privy Council in that judgment." *Ramayya v. Krishnamma*, 10 M. L. J. R., 361, 363, 364.

A mortgage of a minor's property executed by a guardian, without the sanction of the Court, is not void, but voidable, and then he must restore to the mortgagee the benefit that he has received thereunder. *Sinia Pillai v. Munisami*, 9 M. L. J. R., 64; *Sadashiro v. Trimbak*, I. L. R., 23 Bom., 146.

For the purpose of ascertaining the meaning of the term "mortgage" for the purpose of stamp its meaning as given in the Stamp Act alone should be considered. *E. v. Debendra Krishna*, I. L. R., 27 Cal., 587.

In construing a deed the Court should look to the substance and not to the mere form of the deed. Thus where a deed of sale of land for value (executed in 1873) was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of repurchase, but, after many years, gave

notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale, it was held that upon construction of the two deeds, their effect must be taken to constitute a mortgage by conditional sale redeemable under the Regulation XVII of 1806, the procedure of the Act, having regard to the date of the mortgage, being held to be inapplicable. It was also held in the case that intention of the parties could not be ascertained by oral evidence, but that only such extrinsic evidence of circumstances as might be required to show the relation of the written language to the existing facts was admissible. *Balkishen Das v. Legge*, I. L. R., 23 All., 149; distinguishing *Bhagwan Sahai v. Bhagwan Din*, I. L. R., 12 All., 387 P. C.

For the purpose of ascertaining the proper stamps upon an instrument evidencing mortgage, the definition of the term as given in sec. 3, sub-section 13 of the Indian Stamp Act, need alone be looked at. Thus an instrument evidencing an agreement to secure the repayment of a loan of a certain sum of money with interest for which a certain promissory note payable on demand was given as a collateral security is a mortgage within the meaning of the Indian Stamp Act, and the stamp duty on it is payable under Art. 44 of the Sch. I of the Stamp Act, and not under Art. 29, cl. (b) of the Schedule. *Emp. v. Debendra Krishna*, 4 C. W. N., 524.

The mortgage by a *watandar* of *watan* property has no force beyond life of the *watandar* mortgagor. *Padapa v. Swamirao*, 4 C. W. N., 517 P. C.; *Kalu Narayan v. Hanmapa*, I. L. R., 5 Bom., 435, approved.

A purchaser from the mortgagor of a property subject to a mortgage, not a party to the mortgage-suit, is entitled to retain possession of the property till he is foreclosed as against the auction-purchaser, under the mortgage-decree. *Griah Ohunder v. Inoar Chunder*, 4 C. W. N., 432; but *contra* in *Protap Ohunder v. Ishan Chandra*, 4 C. W. N., 266. There is privity between a mortgagor and his sub-mortgagee, though no doubt the right of the sub-mortgagee in the mortgaged property is limited to the interest passed by the sub-mortgagor, that is the original mortgagee and the sub-mortgagee cannot recover therefrom anything more than the amount due to the original mortgagee from the original mortgagor whatever may be the state of the account between himself and the original mortgagee. The original mortgagor is entitled to sue the sub-mortgagee for redemption, and conversely the sub-mortgagee may sue the mortgagor for recovery of his money from the mortgaged property. The sub-mortgage is extinguished by the payment of the mortgage-debt by the mortgagor, if he has no notice or knowledge of the sub-mortgage and acts in good faith; similarly payments made under these circumstances towards the mortgage-debt to the mortgagee will reduce the same *pro tanto* so far as the sub-mortgagee is concerned; but no payment made with notice or knowledge of the sub-mortgagee will discharge wholly or partially the mortgage-debt due to the sub-mortgagee. Following these principles, a sub-mortgagee of property is entitled to retain its possession against the original mortgagor, until the amount due on the sub-mortgage is paid off, and he is not bound to seek his remedy against the original mortgagee. The sub-mortgagee cannot get anything more than the amount due to the original mortgagee at the time when the mortgagor learns of the sub-mortgage. *Chelaram v. Walidad*, 1 P. L. R., 21; following *Muthu v. Venkatachallam*, I. L. R., 20 Mad., 35; *Narayan v. Ganji*, I. L. R., 15 Bom.,

692; *Ganga Prasad v. Chunilal*, 1 L. R., 18 All., 113; *Padgaya v. Baji*, 1 L. R., 30 Bom., 549; and P. R. No. 12 of 1895 dissented from.

The essence of a usufructuary mortgage is that the mortgagee looks to the rents and profits for the satisfaction of his advance, and, inasmuch as no time is fixed for payment there can be no forfeiture. It is this forfeiture that gives rise to the remedies of forfeiture and sale, and in its absence the mortgagee is not entitled to the remedies that spring out of it. In the absence of an express agreement to pay, a usufructuary mortgagee cannot obtain a personal decree. But where the mortgagee has failed to obtain possession he is entitled either to sue for possession or for recovery of his money. Where such a mortgagee is kept out of possession by the mortgagor, he is entitled to recover rents and profits received by the mortgagor during that period; but he can only recover profits received within three years of the commencement of his suit which will be governed by Art. 109 of Sch. II of the Limitation Act. *Gorindrar v. Jiwanji*, 2 Bom. L. R., 201.

An agreement whereby the plaintiff acknowledged to have received Rs. 500, and stipulated that if he paid the assessment on the land for 25 years, the defendant should return to the plaintiff the land which he bought from him some years ago is not a mortgage because the property did not belong to the mortgagor and there was no transfer. Such an agreement would, however, constitute an agreement to sell or convey the land subject to the conditions imposed. *Narayan v. Mahadu*, 2 Bom. L. R., 215.

A *kanom* in so far as it is a mortgage, is a usufructuary mortgage and not a combination of a usufructuary and a simple mortgage; consequently no suit will lie for the recovery of the *kanom* amount. *Viyathen v. Ierarayan*, 9 M. L. J. R., 108.

It is not necessary that in every mortgage the mortgagor should covenant for personal security. No doubt the presumption is that the mortgagor *ipse*, a simple mortgagor, is personally liable to pay the debt, but it is always open to the mortgagor to exclude his personal liability by a specific covenant to the contrary, and the mortgagee would for that matter be no less a simple mortgage. *Wahid-un-Nissa v. Gubardhan*, 1 L. R., 23 All., 453 (461).

The execution of a mortgage-bond in satisfaction of a decree by the judgment-debtor, without the sanction of the Court, is not an agreement to which sec. 257A would apply, since it is not an agreement to give time for the satisfaction of the judgment-debt, but is an actual and present satisfaction of the judgment-debt upon which a new suit would lie. *Tukaram v. Anantbhat*, 2 Bom. L. R., 1012.

S. 59, add:—

A registered document cannot be rescinded except by another registered document. *Ramayya v. Krishnamma*, 10 M. L. J. R., 361. Where a document has been materially altered no suit will lie thereon. Thus where in a case a document ran thus, "the sum for which security has to be furnished as said above is Rs. 2,000. A security should be furnished for this sum of Rs. 2,000 for the minor only," and it appeared that the last few words italicized were subsequently added by the mortgagee without the consent of the mortgagor—it was held that the document was altered in a material part and that a suit upon the altered instrument would not lie, but that since the right to bring the properties to sale which became vested as soon as a

valid mortgage was executed might be said to have been the basis of the suit, the suit should be maintained, and the instrument so far as it was unaltered might be received in evidence of the right of parties. *Subrahmanya v. Krishnayan*, 10 M. L. J. R., 368, F. B.; following *Attorney-General v. Marquis of Ailesbury*, 16 Q. B., 432 (441); *Ramaswamy v. Ohinna Bhavani*, 3 M. H. C. R., 247; *Christacharu v. Karibasayyah*, I. L. R., 9 Mad., 399, F. B. Of course rescission of a document is quite different from its satisfaction as by payment, which may be proved by parol. And it has been even conceded that a receipt, even though it may have the effect of extinguishing a mortgage, is admissible in evidence even though unregistered, since it is primarily only evidence of payment. *Appammamayuralu v. Ramanna*, 9 M. L. J. R., 124.

A mortgage of "all my real and personal estate" is not void for uncertainty, if at the time of enforcing the mortgage it can be ascertained what properties were referred to by the expression. Such a contract is not opposed to public policy, and it would appear that such a covenant, if suitably expressed, might even create a charge on after-acquired property. *In re Kelcey, Tyson v. Kelcey* [1899], 2 Ch., 530.

Where a document fails on account of the material alterations made therein, no subsequent ratification can cure it of its defect. *Raghanaikulu v. Sattamma*, 9 M. L. J. R., 104.

An unstamped and unregistered receipt of payment under a mortgage can be used as evidence of payments as also of appropriation of them, because it makes no variation of the contract itself, but only a modification of the account in consequence of payments. *Lakshman v. Damodar*, 2 Bom. L. R., 422.

S. 60, add:—

A covenant conferring on the mortgagee a collateral advantage, as for example, a right of pre-emption at a certain price is enforceable provided it is not unfair or unreasonable and not due to improper pressure, unfair dealing or undue influence, and provided that the right of redemption is not taken away or fettered. *Binal Jati v. Biranja Kuar*, A. W. N. [1900], 49; S. C., I. L. R., 22 All., 238. Such covenants are always enforceable unless they are shown to be unconscionable or oppressive. *Santley v. Wilde* [1899], 2 Ch., 474; *Biggs v. Hodginott* [1898], 2 Ch., 307.

Where a mortgagee-decree-holder purchases the mortgaged property in execution of a stranger's simple money-decree against his judgment-debtor, he does not acquire the property free from the equity of redemption, but is still liable to be redeemed. *Erusappa v. The Commercial and Land Mortgage Bank*, 10 M. L. J. R., 91. But it must be confessed that this case carries the principle enunciated in *Martand v. Dhonda*, I. L. R., 22 Bom., 624; and *Mayan v. Pukuran*, I. L. R., 22 Mad., 347, a good deal further, and the reasons upon which the rule was enunciated do not certainly support it. For according to the Madras High Court the liability of the mortgagee-purchaser in this respect is based upon a presumed advantage which he is supposed to have over other bidders, or to quote the actual words of the learned judges: "It appears to us that the advantage which his position as mortgagee gives him over competing or would-be competing bidders, in respect of his presumably superior knowledge or better opportunities of knowledge of the mortgaged property and its value and otherwise, exists equally in such a case as it does in a case when the personal decree in execution of which he purchases

is a decree obtained by himself, and that, therefore, in both cases alike, he must be looked upon as availing himself of his position as mortgagee to obtain an undue advantage over the mortgagor or otherwise to be acting *mala fide* in the eye of the law (whether there be actual fraud or collusion or not), and in contravention of the principle which underlies sec. 99 of the Transfer of Property Act, and which is given expression to in sec. 88 of the Indian Trust Act" (*ib.*, pp. 95, 96). As this is the sole reason upon which their Lordships base their decision, it will suffice to say that their Lordships of the Privy Council have in a recent case deprecated this position assigned to a mortgagee-purchaser. In the opinion of their Lordships of the Privy Council (*Mahomed Mira v. Savvasi Vijaya*, 1. L. R., 23 Mad., 227 P. C.) a mortgagee-purchaser is under no disability *quod* mortgagee, and it would hence appear to follow that the view taken by the Madras High Court must be qualified.

Where a suit was brought upon a mortgage against the original mortgagor, and upon the latter's death all his heirs were not brought on the record, and in execution of the decree thus obtained the mortgaged property was sold, it was held that in a suit by the heirs not on the record, they were entitled to redeem their share of the mortgaged property upon payment of a proportionate share of the mortgage-debt. *Surya Bibi v. Monindra Nath*, 4 C. W. N., 507.

A mortgagee-decree-holder who purchases the mortgaged property at a sale in execution of a simple money-decree obtained against the mortgagor by a stranger does not acquire the property free from the equity of redemption but is still liable to be redeemed. *Erusappa v. The Commercial Land Mortgage Bank*, 10 M. L. J. R., 91; *Mayan v. Pakuram*, 1. L. R., 22 Mad., 347; *Martand v. Dhondo*, 1. L. R., 22 Bom., 624.

It is competent for a mortgagee to stipulate that during the continuance of his mortgage the mortgagor shall not purchase certain specified articles from him. Indeed it is on this principle that "tied" houses carry on their business. *Ricc v. Noakes & Co.* [1900], 1 Ch., 213; *Santley v. Wilde* [1899], 2 Ch., 474.

In a suit for redemption the mortgagor is entitled to set-off the amount of rent paid by him for the usufructuary mortgagee who was under the terms of the deed bound to pay it. *Ram Narayan v. Imamuddin*, A. W. N. [1900], 134.

The mortgagor is not debarred from redeeming merely because he had ceased to perform certain services the result of which was that the usufructuary mortgagee's profits were proportionately reduced, since the latter was obliged to pay to the Government full assessment consequent thereupon. *Bhima v. Raghavendra Charya*, 2 Bom. L. R., 211.

The period allowed to the mortgagor to redeem is sixty years, unless there has been any acknowledgment of the liability, in the meantime, in which case limitation would be computed from such acknowledgment, and which, however, cannot be inferred from the fact that in a lease granted of a portion of the mortgaged property by the mortgagee to the mortgagor, the former is described as usufructuary mortgagee. Such a description would no doubt estop the mortgagee, if the latter had been trying to impeach the lease on the ground that he was not usufructuary mortgagee, but it creates no estoppel as regards matters outside the lease, which would preclude the mortgagee-lessor from asserting his true title. "But it is further contended," observed their Lordships, "that this description of the lessor amounts to a representation,

which he is bound to make good. In order to succeed on this ground the mortgagors must show that the description of the lessor was an essential part of the contract that the lessee made the contract in reliance on those terms, and that her position was in some way altered by the terms in which her lessor spoke of himself. (See *Citizens Bank of Louisiana v. First National Bank*, L. R., 6 E. and J., App. 360); and unless the lessee could show at least so much she would have no foundation for contending that her extinct right was revived or re-granted by the terms of the lease." *Fatimat-ul-Nisa v. Sundar Das*, 1. L. R., 27 Cal., 1004 (1012).

A receipt passed by the mortgagee to the mortgagor and setting forth that on taking account a certain sum was due on account of the mortgage, that a sum was paid on the day of the receipt, and that a further specified sum was to be paid in a month and-a-half, and that the rents and profits were in future to be taken for the interest on the balance only, was held to be no more than a mere settlement of accounts not intended to modify or supersede the original mortgage contract, and which, therefore, did not require registration. *Lakshman v. Damodar*, 1. L. R., 24 Bom., 609.

Where the mortgagee has paid Government on account of a *muafi* holding, since assessed, the mortgagor's right to redeem continues unless the grant itself is revoked. And in such a case the mortgagor would still be entitled to redeem. *Bhima v. Raghaven Dracharya*, 1. L. R., 24 Bom., 482.

If there are several co-mortgagees the mortgagor is entitled to redeem by making payment to any one of them such payment is valid, and satisfies the bond and can be successfully pleaded in answer to any suit brought upon it; (s. 38, Indian Contract Act; *Bhup Singh v. Zain-ul-Abidin*, 1. L. R., 9 All., 205, 209; *Barbar Maran v. Ramnan*, 1. L. R., 20 Mad., 461.) To hold otherwise would be to suppose that where a contract is made in favour of more than one person they must be taken to be severally entitled under it for they cannot be severally and jointly entitled. (*Keightley v. Watson*, L. R., 3 Ex., 723.) There is nothing in the Act or elsewhere to justify recognition of the rights and liabilities of a co-mortgagee *in solidum*, and this seems to be also the common law rule in England (*Wallace v. Kelsul*, 7 M. and W. 264), which was conceded even in *Steds v. Steeds* (L. R., 22 Q. B. D., 537, 541) in which, however, the equitable rule was stated to be that one joint-creditor could not pass a receipt on behalf of all.

"Though they take a joint security," it was observed by Wills, J., citing from Lord Alvanley, M. R. (*Morley v. Bird*, 3 Ves., 631), "each means to lend his own money and to take back his own." It was admitted that the rule so stated could but create a presumption which is liable to be rebutted. The rule so stated is founded upon the assumption that as a general rule co-creditors must *prima facie* be regarded as tenants-in-common and not as joint tenants, both of the debt and of any security held for it. (*Petty v. Styward*, Eq., Ca. Abr., 290; *Rigden v. Vallier*, 2 Ves. Sen, 258; *Lake v. Craddock*, 1 W. & T. L. C., 208; cited in *Steds v. Steeds*, L. R., 22 Q. B. D. at p. 541.) If then *Steds v. Steeds* be regarded as settling the law in England, it is divergent from that legislatively enacted in this country. But, of course, the rule that a mortgagor may validly pay off his debt to any co-creditor must be regarded as subject to the exception that where such payment is shown to have been fraudulently made, it would not avail the mortgagor. (*Barber v. Ramana*, 1. L. R., 20 Mad., 461.)

S. 65, add:—

When a mortgagee alienates certain lands to which he has no title and subsequently acquires a good title to it, he is bound to carry out the transfer, but if he mortgages a portion of *his own share* of a joint holding which he has already alienated, he cannot be compelled to make the amount good out of the *other half* share to which he has subsequently succeeded. *Babu Rai v. Shadi Ram*, 1 P. L. R., 337.

S. 67, add:—

In an usufructuary mortgage, the mortgagor's right of redemption is subject to the limitation of sixty years. *Fatimatulnessa v. Soonder Dass*, 4 C. W. N., 565 P. C.

An instrument, therein described as a lease, was executed in consideration of Rs. 120, and it provided that the party paying that sum should remain in possession of certain land for twelve years, but contained no provision for repayment of that sum or for the payment of rent. It was held that the instrument was a usufructuary mortgage and not a lease. Reference under Stamp Act, sec. 46, I. L. R., 21 Mad., 358; reference under Stamp Act, sec. 46, I. L. R., 7 Mad., 203, referred to.

An application by the successor of an usufructuary mortgagee for mutation of names in the collectorate register as such mortgagee, is only an official proceeding and does not amount to an acknowledgment of title made to the mortgagor so as to keep alive the right of the latter to redeem.

The fact that in a lease granted by the mortgagee to one of the mortgagors, after the latter's right to the land was extinguished, the lessor described himself as such mortgagee, does not estop him for matters outside the lease, from asserting his true title in a litigation with the mortgagors.

In order to successfully contend that this description of the lessor amounted to a representation which he was bound to make good, the mortgagors must show at least that the description was an essential part of the contract, that the lessee made the contract in reliance on those terms, and that her position was in some way altered by the terms in which her lessor spoke of himself. *Fatimatulnessa v. Soonder Dass*, 4 C. W. N., 565 P. C.

The rule of *dam-dupat* allows the creditor to recover double the amount of the last balance struck, and not merely double of the principal actually advanced. *Sukalal v. Babu*, I. L. R., 24 Bom., 305.

Where it was shown that in the case of a registered mortgage-deed a part of the mortgage-money was not paid, and the mortgagee sued for possession of the mortgaged property without offering to pay up the part of the mortgage-money unpaid, the claim was dismissed, although the mortgagee applied that decree be passed subject to his paying the amount found as unpaid. *Gopi Chand v. Sardar Khan*, 1 P. L. R., 401.

S. 68, add:—

Where the surplus proceeds from the sale of an estate sold by the Collector were paid by him to one of the two mortgagees in full and the other in part, and the latter sued the former for the balance due on his mortgage on the strength of his being a prior mortgage, it was held that the action of the Collector in making the payment in the manner he did being in contravention of the express provisions of sec. 185 of Act XIX of 1873 (N.-W. P. Land Revenue Act), according to which the surplus should have been made over to

the defaulter, one mortgagee could not sue another for recovery of what he had wrongfully received. *Kunj Rehari Lal v. Parsotam*, A. W. N. [1898], 210.

S. 69, add:—

Though a mortgagee selling under the power of sale has not the same full powers over the property as an absolute owner, he can convey the property to a purchaser with all the legal incidents accompanying the grant, and on a sale of part of the property comprised in the mortgage can give to the purchaser thereof an implied easement of light over the unsold portion. *Born v. Turner* [1900], 2 Ch., 211.

S. 72, add:—

An intruder cannot charge for collection expenses. *Abdul Ghafur v. Raja Ram*, I. L. R., 22 All., 262. Collection expenses are usually allowed at 10 per cent. unless there is evidence of more or less as being the actual expenses incurred. *Girish Chander v. Soshi Shikha*, 4 C. W. N., 631 P.C.

A *Kanomdar* is entitled, during the period of his occupation, to remove and appropriate to himself any trees that he has himself planted, provided he leaves the land substantially in the state in which he received it. *Vasudevan v. Chathoo Achan*, 10 M. L. J. R., 321, F. B; *Krishna Pattar v. Shrinivasa*, I. L. R., 20 Mad., 124; *Achutan v. Narasimban*, I. L. R., 21 Mad., 411. It was also observed by the learned judges that "it may be doubted whether a *kanom* devise can be regarded as a purely agricultural lease. It always, we believe, in the absence of a contract to the contrary, carries with it the right to erect a dwelling-house and appurtenances on the land, and to plant cocoanut and other trees on any land not devoted to grain cultivation." Their Lordships then threw out that while the provisions of s. 108, clauses (n) and (o), which should be read together, did not of their own force apply to a *kanom*, still the rules therein laid down may be applied to it being as they are founded on reason and equity.

In Calcutta it should be noted, the right of a *kanomdar* to cut down trees, planted by himself, is apparently conceded, but he is not allowed to appropriate them. This decision—*Nafar Chandra v. Ram Lal*, I. L. R., 22 Cal., 750, turns on the construction of the terms of the Bengal Tenancy Act, and is no authority for Madras. But even in Madras the rights of *kanomdars* must be distinguished from those of tenants in zemindari tracts—*Rangayya v. Kadiyala*, I. L. R., 13 Mad. 249; *Bhupatti v. Raja Rangayya*, I. L. R., 17 Mad., 54.

S. 74, add:—

Where a mortgaged property is sold in execution of a mortgage-decree at the instance of the first mortgagee, and the second mortgagee who was no party to the previous suit brings a suit to enforce his mortgage making the purchaser a party, it was held that the property having been sold at the instance of the first mortgagee, the only right which the second mortgagee had was the right to redeem, and the plaintiff without redeeming the first mortgage could not bring the property to sale in satisfaction of his subsequent charge. *Durga Churn v. Chandra Nath*, 4 C. W. N., 541.

A mortgaged a certain property to B and then contracted to sell it to C, who sued both A and B for specific performance. Instead of the decree directing, as it should have, the payment of the purchase-money first to B.

it directed the payment to be made to A. The defect was not remedied, and C paid the money in Court, which was paid over to A. B's mortgage-deed was not paid off, and he, therefore, sued both A and C for his money. It was held that he was entitled to a mortgage-decree against both A and the property in the hands of C. *Kandasami v. Jagathamba*, 10 M. L. J. R., 353.

S. 75, add:—

A, first mortgagee, obtained a mortgage-decree without making the second mortgagee a party to his suit, and in execution thereof purchased the property and obtained possession. The second mortgagee then brought a suit on his mortgage, making the first mortgagee and purchaser a party to his suit, and obtained a decree, subject to the rights of the first mortgagee. In execution of this decree he purchased the property, subject to the first mortgagee's right. It was held that the rights of the first mortgagee included the right to retain the possession till he could be redeemed in a prior redemption suit. *Mahomed Karim v. Abdulla*, 10 M. L. J. R., 347.

S. 82, add:—

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt, that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. The result is the same if the purchase by the mortgagee is made under a private contract with the mortgagor and not at auction. *Bisheshur Dial v. Ram Sarup*, I. L. R., 23 All., 284 (290, 293), F. B.; overruling *Sumera v. Bhagwant*, A. W. N. [1895], 1; *Chunna Lal v. Anandi Lal*, I. L. R., 19 All., 196; *Nand Kishore v. Ruji Hariraj Singh*, I. L. R., 20 All., 23, F. B. (see *ib.*, p. 291).

The right to contribution under this section arises only when the owner of one of several properties subject to a common debt redeems the mortgage by paying off the debt. But when the mortgage has not been redeemed, and one of the properties has been sold in execution of the decree obtained on such mortgage, there is no right to contribution in favour of the owner of such property as against the owners of the other properties forming part of the security. The mortgagee of several items of property cannot bring a suit for sale of some of them and for contribution in respect of the rest which together with other properties not comprised in his mortgage having been security for a prior debt, have discharged such prior debt exclusively; because such a suit is bad for misjoinder of causes of action. *Sesha Aiyar v. Krishniengur*, 10 M. L. J. R., 383.

Ss. 83, 84, add:—

Where under this section a deposit is made to the credit of persons who are entitled to it in addition to those who are not, and the former are thereby prevented from drawing it, the deposit is invalid and cannot avail the mortgagor, in a subsequent suit for redemption. *Madhavi v. Kunhi Pathamma*, I. L. R., 23 Mad., 510.

S. 85, add:—

In an appeal against a part of the decree for redemption, though the mortgagees may not be interested in opposing the appeal, they are necessary

parties; and if the appeal is withdrawn as against them, the appeal cannot proceed against the others and will have to be dismissed. *Manakal v. The Collector of Malabar*, 9 M. L. J. R., 49.

A prior mortgagee, without making a puisne mortgagee a party to his suit, and on his mortgage, obtained a decree for sale, sold the mortgaged property, and purchased it himself. Subsequently the puisne mortgagee holding a mortgage over the same property brought his mortgage into suit without making the prior mortgagee a party, and obtained a decree for sale. It was held that the puisne mortgagee could not bring the mortgaged property to sale in execution of such decree. *Mehrbano v. Nadir Ali*, I. L. R., 22 All., 212; following *Janki Prasad v. Kishen Das*, I. L. R., 16 All., 478.

A mortgagee who has obtained a decree for sale in a suit to which he did not make other mortgagees parties cannot bring the mortgaged property to sale in execution of that decree. *Mehrbano v. Nadir Ali*, I. L. R., 22 All., 212.

In a suit against a Mitakshara father on a mortgage executed by him, his son, much less a minor son, is not a necessary party, since the father substantially represents his son, though the name of the latter may not be specifically mentioned as such. The section has not affected the law as to the representation of a Mitakshara son by his father in a suit on a mortgage against the father.

The exceptions mentioned in the section as regards persons whose estate is vested in a trustee, executor or administrator is not exhaustive. *Per Ghose, J.*, in *Lala Surja Pershad v. Golab Chand*, I. L. R., 27 Cal., 724; but *Harrington, J.*, held that in such a case the son is a necessary party where the mortgagee has notice of his existence, and where he is not made a party, he is entitled to a declaration, in a suit brought for that purpose, that the mortgage-decree does not affect his interest.

A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a further cash payment of Rs 59, satisfied the mortgage-debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage-debt proportionate to the share in the joint family property owned by them. *Held*, that the original mortgage having become extinct the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhavani Prasad v. Kullu*, I. L. R., 17 All., 537, referred to. *Dharam Singh v. Angan Lal*, I. L. R., 21 All., 301, followed; *Lachman Das v. Dalu*, I. L. R., 22 All., 394.

Ordinarily when a puisne mortgagee being excluded in the previous suit; institutes a suit of his own for redemption, it is not necessary that the Court should apportion the redemption-money as between the rival claimants, or even determine the rights *inter se* of persons arrayed in the suit as co-defendants. But where this is done in the Lower Court, and both parties do not object to it in appeal, the question of apportionment may then be fitly decided

so as to avoid further litigation. *Wahid-un-nissa v. Gobardhan*, I. L. R., 22 All., 453 (458).

A mortgaged a portion of a property to B, and afterwards joined his brother C in mortgaging that portion together with some other property to D. Both the mortgages were registered. B brought a mortgage suit, without bringing D on the record, and obtained a mortgage decree, in execution of which the portion of the property mortgaged to him was sold by auction and purchased by E. Subsequent to the date of A's decree D brought a suit on his mortgage and obtained a mortgage decree, in the execution of which the property mortgaged to D was purchased by F. Afterwards F tendered to E the amount of the debt due by A to B, and he not accepting it F brought a redemption suit. It was contended on E's behalf that the suit was not maintainable on the ground that D ought to have impleaded the prior mortgage B in his redemption suit, and without offering to redeem his mortgage in his suit, he could not bring the mortgaged property to sale, and if notwithstanding the prior mortgage being not on the record the property be sold the purchaser does not get any property. Therefore by this sale F does not get any interest. It was held that such a suit would lie and that F was entitled to redeem. *Natadin v. Kazim*, I. L. R., 13 All., 432; *Janki Prasad v. Kishen Dat*, I. L. R., 16 All., 478; and *Meherban v. Nadir Ali*, I. L. R., 22 All., 212, distinguished. *Kudratullah v. Kubra Begam*, A. W. N. (1900), 185.

S. 86, add :—

But Shephard, J, has, in an undefended case, sought to distinguish the cases of *Rameshwar Kuer v. Syed Nawab Mehdi Hossain*, I. L. R., 26 Cal., 39 P. C.; and *Bakar Sajjad v. Udit Narain*, I. L. R., 21 All., 361, F. B. He is of opinion that after the day fixed for payment or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and that afterwards there is no more reason for giving interest at the contract rate in the one case than there is in the other. *Commercial Bank of India v. Ateendrubhya*, I. L. R., 23 Mad., 637 (642.) In view of the recent case, decided by their Lordships of the Privy Council, it may be permissible to doubt the accuracy of this view. *Maharajah of Bharatpur v. Rani Kanno Dei*, 5 C. W. N., 137 P. C., although the point discussed by Shephard, J., was not directly discussed by their Lordships.

A mortgage-deed contained covenants for payment at the expiration of a year from its date, with interest to be paid month by month, in the month following that for which it should be due, and to run on from the date of the mortgage at the same rate until the money borrowed and the interest should be paid. It was also covenanted that if before the end of the year the mortgagor should make default in payment of interest during one month after it had become due, in that case the principal and interest should thereupon become claimable. With the latter requirement the mortgagor failed to comply, not paying the interest within the stated time. Held that on the true construction of the deed, this default having taken place, this suit would lie for both the principal and interest accrued due within the year. *Yeo Huan Sew v. Abu Zaffer Kureshi*, I. L. R., 27 Cal., 938.

Where there is no provision made in an instrument for *post diem* interest, nor, on the other hand, is there any indication that there is to be no interest after the due date, the proper rule of construction is that as long as the debt

is improperly withheld, interest should continue to run and at the same rate. *Namburi v. Saladi Papiash*, 10 M. L. J. R., 101.

Where a mortgagor stipulated that should default be made in payment of interest for one calendar month after becoming due, then the principal and interest shall thereupon become due, it was held that the clause was not penal, and its enforcement could not be refused. *Yeo Hetan v. Abu Zaffer*, 4 C. W. N., 552 P. C.

Where the mortgage-deed was not drawn up in the form contemplated by the Civil Procedure Code and the Act, a Court would not be justified in assuming that the mortgagee was not entitled to interest according to the terms of the mortgage bonds until the realization of the mortgage bonds. *Hargoondas v. Mohanbhai*, 2 Bom. L. R., 225.

By the rule of *dam-dupat* a creditor is not to recover only the double of what he has actually lent. He can get double of the last balance struck. *Suklal v. Bapu*, 2 Bom. L. R., 18.

The receipt of interest up to a certain date at one rate of interest does not amount to a waiver of any higher rate of interest to which under the terms of the contract the creditor may be entitled. *Sesha Aiyar v. Krishniengar*, 10 M. L. J. R., 383.

S. 87, add :—

Until an order for foreclosure absolute in proper form is made under this section, the mortgagor can, upon a proper application, redeem the mortgaged property. *Somesh v. Ram Krishna*, 1 L. R., 27 Cal., 705 ; following *Porosh Nath v. Ramjadu*, 1 L. R., 16 Cal., 246 ; *Narayana v. Papayya*, 1 L. R., 22 Mad., 133.

Where a preliminary decree was made for foreclosure, and on the failure of the mortgagor to satisfy the decretal amount within the fixed time, an order was erroneously made that the "order for sale" be made absolute, and after such order the money was paid into and accepted by the Court, and the Court thereafter on the application of the mortgagee amended the said order for sale as being meant for an "order for possession," and directed the order for possession to be made absolute and to have a retrospective effect, it was held that there being nothing in the order making the decree absolute to debar the right to redeem, and further the order not being in conformity with the form given in Sch IV of the Civil Procedure Code nor with the language of this section, the payment into Court by the mortgagor was good payment, and he was entitled to be restored to possession (*ib.*).

Where the mortgage deed is silent as to payment of *post diem* interest, and there is no express provision pointing to the view that *post diem* interest was not intended to be paid, it must be presumed that the interest was intended to run on so long as the principal sum was not paid off. *Ghantayya v. Papayya*, 1 L. R., 23 Mad., 534 ; cf. *Mathura Das v. Raja Narindar Bahadur*, 1 L. R., 19 All., 39 P. C. ; *Pedda v. Ganga*, 1 L. R., 20 Mad., 149 ; *Surala Dasi v. Jogenendra Narayan*, 1 L. R., 25 Cal., 246 (248), but section. *Moti Singh v. Ramohari*, 1 L. R., 24 Cal., 699, dissented from in the first cited Madras case.

S. 88, add :—

Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage-deed, and this fact was apparently overlooked by the defendant who defended the suit, and where,

while the judgment declared "that a decree be given against the hypothecated estate," in the decree the property affected was described as "the property specified in the plaint." It was held, that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither sec. 13 nor sec. 244 of the Code of Civil Procedure excluded the defendant from subsequently suing to recover the property wrongly included in the plaint. *Ram Chander v. Kondo*, I. L. R., 22 All., 442.

A simple mortgagee is not a person entitled to have a sale set aside under sec. 310A of the Code of Civil Procedure. The case would be different if the mortgagee had been one by conditional sale. In the latter case the legal title in the property having vested in him, he may claim that the property sold is "his immoveable property," but this cannot be said of a simple mortgagee who is simply a mortgagee and nothing more. *Nitya Nanda v. Hera Lull*, 5 C. W. N., 63, distinguishing *Hamidal Huq v. Mutangini*, 2 C. W. N., cclviii; *Rakhal Chunder v. Dwarika Nath*, I. L. R., 13 Cal., 346.

But when it is said that a plaint may be created as an application, it implies that the plaint is filed within the period in which an application should be put in, and that the suit is filed in the Court in which the application would have to be filed. *Lalman Das v. Jagun Nath*, I. L. R., 22 All., 376.

S. 89, add:—

Execution-proceedings commenced by the mortgagee-decree-holder since deceased may be continued by his legal representatives without obtaining a succession certificate under sec. 4 of the Succession Certificate Act. But it would be otherwise if the decree-holder dies before suing out execution. *Khaja Mohammad v. Abdur Rahman*, 4 C. W. N., 558; following *Raghunath v. Poresh Nath*, I. L. R., 15 Cal., 54; *Kanchan v. Baijnath*, I. L. R., 19 Cal., 336; *Baid Nath v. Shamanand*, I. L. R., 22 Cal., 143; dissenting from *Fateh Chand v. Muhammad*, I. L. R., 16 All., 259.

The mortgagee who has purchased the mortgaged property in execution of his own decree is not a representative of the mortgagor within the meaning of sec. 244 of the Code, and he could not, therefore, object to the execution of the decree of another mortgagee against the same property. *Baldeo Prasad v. Madan Mohan*, A. W. N. [1900], 42; see *Sabkajit v. Sri Gopal*, 17 I. A., 222.

A mortgage-decree, though finally passed by the Appellate Court, should be executed only by the Court of First Instance. This procedure is convenient and is in accord with the invariable practice of the Madras High Court. *Venkatakrishna v. Thiagaraja*, I. L. R., 23 Mad., 521; following *Oudh Behari Lal v. Nagreshar*, I. L. R., 13 All., 278.

It has been held in Bombay that the mortgagor could not redeem nor ask for enlargement of time after the expiration of the time appointed for payment, after which the Court has no option but to make the decree absolute. *Tumram v. Gajanan*, I. L. R., 24 Bom., 300.

In a recent case it has been laid down that although an order absolute for sale of mortgaged properties is in strictness necessary, but where the judgment-debtor was aware of the intended sale and even applied for an adjournment of it, but did not object till after it had taken place, it was held that the sale could not be set aside especially as there was no allegation of damage. *Ruyila v. Narayana*, 10 M. I. J. R., 205.

A plaint to set aside a sale made under this section may be treated as an application under sec. 244 of the Code of Civil Procedure. *Biru Mahata v. Shyama Churn*, I. L. R., 22 Cal., 483; followed in *Mayan v. Pakuran*, 9 M. L. J. R., 98; to the same effect in *Lalman Das v. Jagannath*, I. L. R., 22 All., 376.

Section 310A has been held to be applicable to mortgage-decrees in Bombay, where it is held that the effect of the section is to modify sec. 89 by postponing the operation of orders passed thereunder. This view is now in conformity with that taken by the High Courts of Allahabad and Madras (*Rajah Ram Singhji v. Chunnilal*, I. L. R., 19 All., 205; (*Srinivasa v. Ayyathorai*, I. L. R., 21 Mad., 416; *Tirumal v. Syed Dastaghiri*, I. L. R., 22 Mad., 286), and by a divisional Bench of the Calcutta High Court (*Ashruf Ali v. Netlal*, I. L. R., 23 Cal., 682); but it varies from that taken by the Full Bench in a more recent case of the latter High Court (*Kedar Nath v. Kali Churn*, I. L. R., 25 Cal., 703, F. B.). It was stated in the last case that sec. 310A could not consistently, with the operation of sec. 89, be incorporated with the rules framed under sec. 104, inasmuch as the section of the Code would reopen an order deemed to be final under the Act. But on this objection Ranade and Crowe, JJ., observed: "There is no more inconsistency of sec. 310A with the provisions of sec. 89, than there is of sec. 310 or 311 or better still, sec. 291, which gives great discretionary powers to the Courts to stop or adjourn sales." But it may be contended that to stop and adjourn a sale is a thing quite apart from *cancelling* it. A suspensory order would hardly be inconsistent with the provisions of sec. 89, but an order allowing redemption after it has been finally refused under sec. 89 would certainly be inconsistent with the tenor of the section and the Act, a point which appears to have escaped the notice of the learned Judges of the Bombay High Court. *Krishnji v. Mahader*, 2 Bom. L. R., 635.

Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether it has been rightly made. *Kannailla v. Chunder Sen*, I. L. R., 22 All., 377, distinguishing *Matadin v. Kuzim Hussain*, I. L. R., 13 All., 432; *Mukhoda v. Gopal Chander*, I. L. R., 20 Cal., 734 (737); and following *Rewa Mahton v. Ram Kishen*, I. L. R., 14 Cal., 18 P. C.; *Hargu Lal v. Gobind Rai*, I. L. R., 19 All., 541.

When it is said upon passing an order absolute for sale the security shall be extinguished, it does not mean that the *debt* shall be distinguished, for in a mortgage where the mortgagor may be personally liable, as, for example, in a simple mortgage, the mere order to sell the property cannot extinguish the *personal* security, which would still continue so long as the whole debt is not discharged. Of course, where by the sale of the property the mortgagee has been fully paid off both the security and the debt would be finally extinguished. It was doubtless to note this difference that the language of the section differs from that used in s. 87. *Wahid-un-Nissa v. Gobardhan*, I. L. R., 22 All., 453 (466).

A puisne mortgagee cannot bring the property to sale except by redeeming the prior mortgage. *Wahid-un-Nissa v. Gobardhan*, I. L. R., 22 All., 453;

(457, 470); see also *Dip Narain Singh v. Hira Singh*, I. L. R., 19 All., 527; *Baldeo Bharti v. Hushiar Singh*, A. W. N. (1895), 45.

The question as to how far the purchaser of property sold in execution of a mortgage-decree for sale acquires the rights of the mortgagee is one which cannot be answered without some difficulty. Suppose a property is charged with two separate incumbrances, and the holder of a money-decree brings to sale and himself purchases the property comprised in the mortgage-decree for sale obtained by the prior of the two mortgagees, and subsequently this mortgagee assigns away his interest to another, who claims the redemption money paid by the puisne mortgagee, the question would arise as to whether the purchaser is entitled to the whole of the amount or to only so much of it as he had paid for the property at the execution-sale.

Of course, it cannot be contended that the mortgagee in every case loses all rights under his mortgage by the fact of the sale of the mortgaged property. No doubt by the fact of the sale he transmits to his purchaser all the rights he has in the *property*, but since in a simple mortgage the mortgagee has also personal remedy against the mortgagor, his mortgage-rights do not suffer extinguishment by the sale of one of the two securities open to him. No doubt if the purchaser has paid money sufficient to satisfy the amount of the mortgage, the mortgagee has then no equity which he could enforce against the puisne mortgagee. But if, on the other hand, the purchase-money paid by such purchaser did not fully satisfy the amount of the prior mortgage, she is not entitled, upon redemption by a puisne mortgagee, to the whole of the amount of the prior mortgage. No doubt the subsequent mortgagee would have to pay the full amount due upon the prior mortgage, but that amount would be apportioned between the purchaser, whose purchase-money satisfied the mortgage in part, and the mortgagee to whom the balance of mortgage-money is due. This view taken by the Allahabad High Court in *Dip Narain Singh v. Hira Singh*, I. L. R., 19 All., 527, was pronounced to be no more than an *obiter dictum* which Aikman, J., refused to follow. *Wahid-un-Nissa v. Gobardhan*, I. L. R., 22 All., 453 (469). But Banerji, J., who had formed with Aikman, J., the Bench which decided the earlier case of *Dip Narain Singh v. Hira Singh*, I. L. R., 19 All., 527, while admitting the pronouncement on the point to be *obiter*, not only supported the view, but gave fresh reasons for upholding it (*Wahid-un-Nissa v. Gobardhan*, I. L. R., 22 All., 453, 459. Citing *Baldeo Bharti v. Hushiar Singh*, A. W. N. (1895), 45, the learned Judge observed :—"There can be no doubt that if the first mortgagee himself has purchased the mortgaged property, he alone is entitled to the mortgage-money. It is also beyond question that if a stranger, *i.e.*, a person other than the mortgagee, becomes the purchaser, and the price paid by him fully satisfies the amount of the mortgage-debt, the whole of the mortgage-money should go to him alone, the mortgagee having no longer any right to the money. But if such other person has paid only a part of the debt due to and received by the mortgagee. ... I fail to see under what principle of law or equity he would have the right to appropriate any sum in excess of the amount paid by him. If the appellant's contention is correct, such person would be entitled to the whole of the money paid for redemption. As, however, in the case supposed, a part only of the debt due to the first mortgagee had been discharged, the right of the first mortgagee to recover the balance due to him would still subsist. When, therefore, he realizes the

amount of the balance, as he is entitled to do, the result will be that the amount of the same debt will have been recovered twice over—a result which no Court of Justice should countenance or sanction.”

Under the Act no power to re-open a foreclosure is reserved to the Courts. *Shankar Rao v. Ganesha Teli*, 13 C. P. L. R., 177.

Where a first mortgagee purchased the properties in execution of his mortgage-decree and obtained possession of the same, without making the second mortgagee a party to his suit, and the second mortgagee having instituted a suit to which he made the purchaser a party and obtained a decree for sale, subject to the rights of such purchaser, and purchased the very same properties in execution of his decree, it was held that the rights of the first mortgagee-purchaser, subject to which the properties were directed to be sold, included the right to remain in possession until redeemed in a proper suit framed for the purpose, and that the second mortgagee-purchaser was not entitled to obtain possession of the property in execution. The first mortgagee's right to possession could not be forfeited by a sale made in favour of the second mortgagee, who could not have claimed more than a right to redeem the first mortgage had he been impleaded in the first suit, and which right he had acquired by purchase in his suit. *Mahomed Karim v. Abdulla*, 10 M. L. J. R., 347, relying on *Venkata v. Ramiah*, 1. L. R., 2 Mad., 112; *Nanak Chand v. Telukdye Koer*, 1. L. R., 5 Cal., 265; *Venkata v. Kannam*, 1. L. R., 5 Mad., 188. This case of *Rangaya v. Parthasarathi*, 1. L. R., 20 Mad., 121, is no authority for maintaining the contrary, for the point actually decided in that case had regard solely to the sufficiency of the decree made in favour of the second mortgagee. There was no question in that case as to the first purchaser's right of possession, and the decree did in fact completely protect the right of the first mortgagee, who had bought (*per* Shephard, J., in *Mahomed Karim v. Abdullah*, 10 M. L. J. R., at p. 349); *Narayanasami v. Narayana*, 1. L. R., 17 Mad., 63, turned upon the special facts of the case, and different reasons were given by the two learned judges for the conclusion at which they arrived.

In a recent case, the facts of which were on all fours with those of *Mahomed Karim v. Abdullah*, a similar view was taken. *Baldeo Singh v. Jaggu Ram*, A. W. N. (1901), 176.

Where property was purchased by the mortgagee at an execution-sale, which, for some defect, was liable to be set aside, and the heir of the mortgagor subsequently sued to redeem his mortgage, ignoring the execution-sale, it was held by the Privy Council that the heir could not succeed in the redemption suit unless he first brought a suit to set aside the execution-sale. A party seeking relief inconsistent with a previous sale must pray to have the sale set aside. *Malkarjun v. Narhari*, 5 C. W. N., 10 P. C.

When in execution of a decree upon a first mortgage, the second mortgagee purchases properties forming part of his security, he takes the properties free of the right of redemption by the mortgagor, in the same way as a stranger would have done; and his right to realize his mortgage-debt by a sale of the other items of property comprised in the mortgage is in no way affected by such purchase. *Setha Aiyar v. Krishniengar*, 10 M. L. J. R., 383, following *Shaw v. Bunny*, 2 De Gek J. and S., 468; *Eruisappa v. Commercial and Land Mortgage Bank*, 10 M. L. J. R., 91, doubted.

S. 90, add:—

Every suit on a mortgage containing an express or implied covenant to pay the mortgage-money otherwise than out of the mortgaged property must be regarded as impliedly, if not expressly, a suit claiming such relief, the point being that the plaintiff instead of being obliged to include a prayer for such relief in the plaint, may wait until it appears that the sale-proceeds are insufficient, and then make the prayer in an application under sec. 90. *Badri Man v. Raja Ram*, A. W. N. [1899], 22; *Masnah Zaman v. Inayatullah*, I. L. R., 14 All., 518; *Bageshri Dyal v. Muhammad Naqi*, I. L. R., 15 All., 331; *Hamid-ud-din v. Kedar Nath*, I. L. R., 20 All., 386; *Ohattar Mal v. Thakuri*, A. W. N. [1898], 138, referred to.

A decree under sec. 90 will be passed only after the sale of the whole of the mortgaged property is found to be insufficient to satisfy the mortgagee's claim. *Badri Das v. Inayat Khan*, A. W. N. [1900], 123.

In order to make the remedy provided by sec. 90 available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under the section. The section does not apply where the mortgaged property has been sold under a decree held by some other person. *Muhammad Akbar v. Munshi Ram*, A. W. N. (1899), 208; followed in *Badri Das v. Inyat Khan*, I. L. R., 23 All., 404.

S. 91, add:—

A *ryot* is not a person "interested" within the meaning of clause (a), and he cannot, therefore, redeem. *Girish Chunder v. Juramani*, 5 C. W. N., 83.

A purchaser of a portion of the equity of redemption is of right entitled to redeem only the part comprised in his purchase. He cannot claim to redeem the whole property under the mortgage, unless the mortgagee so will it. *Nawab Azmutali v. Jowahir Singh*, 3 M. I. A., 404 (415), followed in *Girish Chunder v. Juramani*, 5 C. W. N., 83 (85).

S. 98, add:—

The applicability of this section is not taken away merely because the decree is not drawn up in the terms of sec. 82. *Murlidhar v. Parasharam*, 2 Bom. L. R., 633.

Execution of decrees should be made by the Court, which passed them, and not by any other Court. The Appellate Court may modify or reverse the decree of the Court of first instance, but that is no reason why the decree should be executed by it and not by the first Court. *Venkata Krishna v. Thiagaraya*, I. L. R., 23 Mad., 521; cf. *Ondh Behari Lal v. Nageshar Lal*, I. L. R., 13 All., 278.

S. 99, add:—

Where an order for sale of the mortgaged property in execution of a money-decree of the mortgagee was obtained after notice to the mortgagor, and the property was sold in pursuance of such order, the mortgagor could not go behind the order and seek to set aside the sale on the ground that it ought not to have been passed by reason of the prohibitory rule of the section. *Thaleri v. Thandora*, 10 M. L. J. R., 110.

In *Sheodini v. Ram Saran* (I. L. R., 26 Cal., 164) the mortgagee purchased the mortgaged property in execution of a money-decree contrary to the

provisions of sec. 99. He then sued for possession which was decreed. The ruling does not appear to take note of sec. 244 of the Code. It is true that the purchaser's right to possession is not a question relating to *execution*, but the judgment-debtor could have well objected to the validity of the sale as having been made in contravention of sec. 99, under sec. 244 of the Code. Cf. *Muthuraman v. Sundra Kumura*, 9 M. L. J. R., 113, F. B.

When an order for the sale of mortgaged property in execution of a simple money-decree is passed after notice to the mortgagor, and the property was sold pursuant to such order, it was held that the mortgagor could not go behind the order and seek to have the sale set aside under sec. 99. *Thambri v. Thandoru*, 10 M. L. J. R., 110.

S. 99, p. 493 to note 2, add:—

Gorind v. Parasharam, 2 Bom. L. R., 864 (in which the scope of both sec. 43 of the Code of sec. 99 will be found to be discussed).

S. 100, add:—

The payment of a premium on a life policy is not to be regarded as securing a certain part of the money assured by the policy. The whole of the premiums are paid to keep up the policy, and no proportionate part of the money payable under it is represented by the payment of any particular premium. *In re Harrison v. Ingram; Ex-parte Whinner*, L. R. [1900], 2 Q. B., 710.

S. 101, add:—

Section 101 is one of general application and has been applied to control secs. 165 and 167 of the Bengal Tenancy Act; where a simple mortgagee has purchased the mortgaged property in execution of a rent decree, he is entitled to proceed against the other properties of the mortgagor. *Mastullah v. Gyan Mamud*, 4 C. W. N., 735; *Guluk Chunder v. Ram Sunker*, 4 C. W. N., 268, dissented from.

S. 106, add:—

The question whether a *zur-i-peshgi* lease is to be regarded as an usufructuary mortgage or a lease depends upon whether the transfer was made for the purpose of securing the payment of money advanced or in consideration of a price paid. *Manickchand v. Vishnu*, 12 C. P. L. R., 96.

One tenant-in-common cannot restrain another for a temporary removal of the subject-matter of the tenancy-in-common, as where it is necessary to lay a drain pipe for the purpose of carrying off the drainage from his premises. *Mohanchand v. Isakbhai*, 2 Bom. L. R., 898; cf. also *Jacob v. Seward*, L. R., 5 E. and I. A., at p. 474; *Cubitt v. Porter*, 8 B. & C., 257 (270); *The Standard Bank v. Stokes*, L. R., 9 Ch. D., 68.

S. 106, add:—

In a suit for ejectment, under the Act, a notice to quit addressed to all the joint-tenants who lived in commensality, but served upon only one of them and acknowledged by him is good service on all. *Rajoni Bibi v. Hafisonnissa*, 4 C. W. N., 572, P. C.; following *Doe d. Lord Macartney v. J. Crick and W. Crick*, 8 R. R., 848.

This section is inapplicable to agricultural leases, and hence it has been held that a zemindar could not avail himself of the provisions of this section to eject a tenant holding under him subject to the payment of an annual *kist* or assessment. *Cheekati v. Ranasooru*, I. L. R., 23 Mad., 318; *Achayya v.*

Hanantrayudu, I. L. R., 14 Mad., 269, distinguished. But in all such cases regard must be had to the fact that the party relying upon the exemption shows that his is not only an agricultural lease but that he is a tenant thereof.

No previous notice to quit is necessary, as it is in England to determine a tenancy-at-will. The suit for possession being in itself deemed to be a sufficient demand. *Ramlal v. Devia Nath*, I. L. R., 23 Cal., 200; *semble* in *Chemminian v. Udayavarma*, 10 M. L. J. R., 201.

A tenancy-at-will is determined by the death of either party. *James v. Dean*, 8 R. R., 185; followed in *Chemminian v. Udayavarma*, 10 M. L. J. R., 201.

A tenant by sufferance is not a "tenant" within the meaning of Arts. 139 and 144 of the Limitation Act. His possession from the period of the fixed lease is wrongful, and limitation against the landlord would therefore commence to run from the expiration of the term unless there is evidence from which a fresh tenancy can be inferred. *Chandri v. Daji*, I. L. R., 24 Bom., 504.

Under the section 15 clear days' notice must be given. A notice served on the 16th and terminable on the 30th of a month is therefore insufficient. *Subadini v. Maharaja Durga Churn Law*, 4 C. W. N., 790.

Service of a notice by registered post is valid, provided that it is proved that the postal pcon tendered or delivered it either personally to the party or to one of his family or a servant. *Subadini v. Maharaja Durga Churn Law*, 4 C. W. N., 790; *Rajoni Bibi v. Hajisunnissa*, 4 C. W. N., 572.

The mode of service of a notice given under the section is different to that provided by the several local Acts. Thus for example service of a notice under the Bengal Tenancy Act by post is bad under Rule 3, Ch. I of the Rules made by the Government of Bengal under sec. 189 of that Act. *Taradas v. Ram Doyal*, 2 C. W. N., 125; *Lala Makhun Lal v. Lala Kuldip Narain*, I. L. R., 27 Cal., 774.

S. 107, add:—

Where a tenant under a yearly tenancy holds over, he becomes a tenant by sufferance at the determination of the tenancy, and a suit to evict him must be brought within twelve years of that date, in accordance with Art. 139 of the Limitation Act. *Chandri v. Daji*, 2 Bom. L. R., 491.

A tenancy at will expiring as it does on the death of either party may be terminated without notice to quit. *Chennuissian v. Udayavarma*, 10 M. L. J. R., 210.

S. 108, add:—

Cl. (c):—Defendant No. 3 mortgaged certain land to defendant No. 2, who sold it to defendant No. 1, who then leased it to the plaintiff for a period longer than was covered by the period of the first mortgage. The plaintiff was then ejected by defendant No. 3 in execution of his decree, and the plaintiff sued all the three defendants for possession. It was held that the law as it stood before the Act was that in the absence of express agreement to the contrary, a landlord was bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him or by right paramount to him, but not against wrongful act of strangers. The unqualified words of the clause must be understood to have enlarged, and not narrowed this law. The defendant No. 3 was not a person without lawful right, *i.e.*, a stranger against whose wrongful disturbance the lessee must protect himself. Defendant No. 1 as lessor, was, therefore, bound to

indemnify the plaintiff for the loss caused to him on account of his ejection. *Toiyawa v. Girishidapa*, 2 Bom. L. R., 1070.

A tenant in an agricultural village, who has built a house on zemindari land with the zemindar's consent, is not entitled to sell or mortgage the house so as to pass any right in the site thereof. His only right extends to the superstructure. *Amir Begam v. Balak Ram*, A. W. N. (1900), 182, following *Ohhaju Singh v. Kanhia*, A. W. N. (1881) 114; *Sri Girdharalalaji v. Ohotelal*, I. L. R., 20 All., 248.

Where after letting a house with a covenant for quiet enjoyment undisturbed by the lessor or anybody else claiming under him, the landlord built a house on the neighbouring land and caused the chimneys to smoke, it was held that the covenant had been broken. *Tebbe v. Cave*, L. R. [1900], 1 Ch., 642, following *Sanderson v. Berwick-upon-Tyne Corporation*, 13 Q. B. D., 547; *Manchester, &c., Ry. v. Anderson*, L. R. [1898], 2 Ch., 398.

S. 111, add :—

A yearly tenant claiming to be a *mirasi* or permanent tenant disclaims his landlord who can then eject him without notice. *Mahipat v. Lakshman*, 2 Bom. L. R., 228.

It has been held in England that a covenant not to assign is not broken by the lessee promising to stand possessed of the leasehold for the benefit of a trustee for his creditors and dispose of the property as the trustee may direct. An equitable assignment is not within the scope of the covenant which should be understood as excluding only legal assignments. *Gentle v. Faulkner*, L. R. [1900], 2 Q. B., 267.

S. 116 (§ 841), add :—

Certain land was let by a written lease in 1876 for four years. In 1890 the lessor brought a suit for arrears of rent and for recovery of the land, basing his claim on an oral lease of 1886. The claim was decreed. But the execution was allowed to be barred. In 1898 the lessor again brought a suit to recover the land, basing his claim on his general title and the written lease of 1876. It was held that the lessee having recognized the lessor's status as landlord in 1890 was precluded from setting up a title acquired by adverse possession. *Kutti Ali v. Chendan*, I. L. R., 23 Mad., 629.

S. 121, add :—

A bequest conditioned upon the continuance till death of the immoral relations between the testator and the legatee is void and cannot be enforced. *Tayaramma v. Seetaramaswami*, 10 M. L. J. R., 214.

S. 122, add :—

A gift by will, for a particular purpose only, gives rise to a resulting trust of any surplus not required for that purpose, but a gift, subject to the performance of a particular purpose, gives the donee a beneficial interest subject to that purpose. *In re West George v. Grose*, L. R. [1900], 1 Ch., 84.

A gift to a donee whom the donor had been keeping for three years before the deed "as adopted son" would take effect as made to a *persona designata* and is not dependent upon the validity or invalidity of the latter's adoption. *Subbarayer v. Subbammal*, 4 C. W. N., 805 P. C.; see also *Nidhoomoni v. Bharoda Pershad*, 26 W. R., 91 P. C.

The language of one instrument does not afford much assistance in the construction of another. *Subbarayer v. Subbammal*, 4 C. W. N., 805 (808)

P. C. But this remark was made in connection with an argument in which the language of one deed was sought to be construed in the light of a deed upon the construction of which their Lordships had decided another anterior case. in which neither the scribe nor the parties were the same.

S. 123, add :—

In a case where the subject of the gift being in possession of the tenants a deed of gift with the counterpart lease made over to the donee was considered sufficient, being "such as the nature of the object permitted." *Wannathàn v. Aeyakadath*, 6 M. H. C. R., 194. (For other cases on Hindu Law, see Mayne's Hindu Law, § 353.)

S. 126, add :—

A will containing clear words of inheritance, but containing a clause forbidding alienation, will take effect as if the clause did not exist. *Kannu Pillay v. Chellathammal*, 10 M. L. J. R., 208.

The words *varas* (heir) and *malak* (owner) impart the same thing and the former as absolutely conveys the property as the latter. *Chunilall v. Bai Nuli*, I. L. R., 24 Bom., 420; cf. *Lallu v. Jagmohan*, I. L. R., 22 Bom., 409.

When a voluntary gift is obtained by means of an innocent misrepresentation of fact by the donee, the donor on the discovery of the mistake has a right to recover his gift. *In re Glubb : Bamfield v. Rogers*, L. R. [1900], 1 Ch., 354.

S. 129, add :—

A gift, by way of affection, of a small share of moveable property most of which was acquired by the donor while in union with his sons and grandsons, cannot be impeached as being opposed to the principles of Hindu law. The power of the father to dispose of moveables acquired by him in a state of union with his sons has always been admitted to be much larger than what he has over immoveable property. *Hanmantapa v. Jivubai*, 2 Bom. L. R., 478.

When a Hindu husband bequeaths moveables to his wife without express words making them over to her absolutely, it is to be presumed as in the case of other property that his intention is to give her merely a widow's interest in them. Hence where a Hindu got his life insured in favour of his wife and died on the 2nd April 1899, and his wife died the next, on the question, whether the insurance money were to go to the husband's heirs or to the wife's heirs, it was held that the husband's heirs were entitled to the money. *Bhikaji Dattatraya*, 2 Bom. L. R., 888.

S. 131, add :—

A decree is not a debt within the meaning of the word as used in the section so as to make the transfer void without notice. *Dagadu v. Vanji*, I. L. R., 24 Bom., 502; following *Afzal v. Ram Kumar*, I. L. R., 12 Cal., 610.

Notice that an assignor of a specific fund in an administration suit is a trustee and a defendant to a suit for accounts in which his fund might be made answerable in case of default proved, is insufficient to affect the assignee. *Edgar v. Plomley*, L. R. [1900], A. C., 431 P. C.

S. 136, add :—

A pleader's clerk as such is not disqualified from purchasing an actionable claim within the meaning of the section. *Hiralal v. Mt. Dhammo*, 9. O. P. I. R., 35.

II. CORRIGENDA.

- P. ix last line *delete* (Appendix III) after *Addenda et Corrigenda*.
- 33 line 18 For *makes clear* read *makes it clear*.
- 35 " 31 For *dolt* of a kinsman read *death* of. &c.
- 41 " 17 For *remarked* upon read *embarked* upon.
- 50 " 31 For *estate*. Unless read *estate unless*. &c.
- 133 " 24 For *a minor* read *by a minor*.
- 152 " 29 For *and sec. 131* read *and sec. 130*.
- 180 " 27 For *at acquiescence* read *or acquiescence*.
- 205 " 19 After trust add (§ 342).
- 233 " 4 Not it read *not because it*.
- 246 " 6 After lands *delete*, and add the words were held to be
sufficiently indicative of the intention to mortgage.
- 334 in note 5 For 458 read 454.
- 383 line 1 Of marginal note to s. 79 for mortgagee read mortgage.
- 409 " 13 After *increase the* read *increase the costs of*. &c.
- 424 " 5 For *and Bombay* read *and in Bombay*.
- 427 " 1 For *or improper* read *of improper*.
- 457 " 6 For *the Lordships* read *their Lordships*.
- 496 " 12 *delete* if after that.
- 624 " 2 For *As regard* read *As regards*.
- 640 " 9 For *fee* read *be*.
- 715 " 14 For *In favour by* read *in favour of*.

Dr. G. E. F.

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